

Regulatory Impact Statement

MODERNISE THE GOVERNANCE ARRANGEMENTS FOR UNIVERSITIES AND WĀNANGA THROUGH CHANGES TO THE EDUCATION ACT 1989

Agency Disclosure Statement

This regulatory impact statement has been prepared by the Ministry of Education.

This regulatory impact statement provides an analysis of options to ensure that universities and wānanga are governed efficiently and effectively. Development and analysis of options was informed by public consultation and by communication with university and wānanga councils and senior management.

This regulatory impact statement recommends changes to the following parameters of university and wānanga governance: council size, council membership, council members' capabilities, and members' individual duties and accountabilities. These changes would require legislative change to the Education Act 1989.

This regulatory impact statement identifies significant risks with proceeding with the recommended changes. It is likely that proceeding with the recommended changes will be met with opposition from some universities, most union and peak-body organisations, and many individuals.

Staff and students may feel particularly disenfranchised by the elimination of required representational membership from university and wānanga councils. Their reactions to legislative change may be significant and may mean that the costs of change could erode the benefits.

None of the options considered in this regulatory impact statement are likely to impair private property rights or to override common law principles. The options will have minimal impacts on business costs.

Roger Smyth
Acting Group Manager, Tertiary Education, Ministry of Education

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Status quo

General

Tertiary education institutions (TEIs) are established under the Education Act 1989 (the Act), which sets out the legal requirements regarding their establishment, governance, operations, and funding. TEIs include universities (eight), institutes of technology and polytechnics (ITPs, 18), and wānanga (three). The Act states that TEIs are bodies corporate, and that they are to be governed by councils of a specified composition and with certain functions, duties, and powers. The Act also protects TEIs' autonomy and academic freedom, subject to legislative conditions. There are different governance models for university and wānanga councils. Universities and wānanga have larger, more representative councils than ITPs, which have smaller, skills-based councils.

Universities and wānanga

The Act requires universities and wānanga to have councils of 12 to 20 members, with membership as follows:

- four members appointed by the Minister responsible for tertiary education
- the chief executive
- one to three members of the academic staff
- one to three members of the general staff
- one to three students
- having regard to the courses provided by the institution, one member representing the central organisation of employers
- having regard to the courses provided by the institution, one member representing the central organisation of workers
- if appropriate, one member representing professional bodies
- additional members co-opted or appointed by the council, or elected members.

The Act directs the Minister as far as practicable to appoint council members with management experience to enable the council to perform its functions. The Act does not direct councils to consider whether council members are capable of governing universities. Each council appoints its chairperson and deputy chairperson.

The duties of councils, as currently provided for in the Act, are collective duties. These include a requirement that councils “ensure that the institution operates in a financially responsible manner that ensures the efficient use of resources and maintains the institution’s long-term viability”, and also that they “strive to ensure that the institution attains the highest standards of excellence in education, training and research”. There are no provisions about the individual duties of council members.

At present the Act enables the Minister to dissolve a university or wānanga council if he/she believes that there is a serious risk to the operation or long term viability of the institution and if the other methods of reducing the risk have failed or appear likely to fail. In addition, the council may, by resolution, remove a member of a

council if he/she is declared bankrupt, becomes subject to a property or personal order, does not disclose a conflict of interest, or fails to attend three consecutive meetings. There are no provisions in existing legislation for the removal of individual university or wānanga council members for poor performance.

The Act sets out a number of other governance-related requirements in sections 169 to 171 and 173 to 179. Appendix one provides more detail on the current governance settings for universities and wānanga and for ITPs.

Appendix Two indicates council membership for each university and wānanga.

ITPs

Following reforms in 2009, ITPs have smaller councils whose members are appointed principally on the basis of their governance skills and experience. The Act legislates that councils are eight members: four members are appointed by the responsible Minister and four are appointed by the council. The Minister also appoints the chairperson and deputy chairperson for each ITP council.

Reforms added sections to the Act specifying the duties of individual council members. In particular, individual members are under a duty:

- to act with honesty and integrity
- to act in good faith and not at the expense of the institution's interests
- to act with reasonable care, diligence, and skill
- not to disclose information.

Reforms also established accountability settings allowing the council and the responsible Minister to hold individual council members accountable for their performance: the responsible Minister may, for just cause, remove a council member who does not comply with his or her duties, while the council may bring action against a council member for breach of any individual duty.

Supplementary research

As part of the reviews of university and wānanga governance, supplementary research was undertaken on a number of governance-related matters. This section summarises this research, and appendix three provides detailed information.

Previous reviews of TEI governance in New Zealand show different viewpoints on governance and the need for reform. Some reviews recommend smaller and/or skills-based councils; other literature supports the current representative model. A 2011 review by the Tertiary Education Commission (TEC) shows that the 2009 reforms to ITP governance have resulted in more capable ITP councils.

Research into good governance principles shows general agreement that the core basic principles to achieve good governance include strategic thinking, responsiveness to change, efficiency, accountability, transparency, clarity of roles and responsibilities, and participation.

The OECD and World Bank have issued guidance regarding best practices for TEI governance, including that it is important that the number of members on a council be

sufficiently large to reflect a sufficiently broad number of perspectives, skills and interests but small enough to carry out its business effectively. The OECD notes a trend of more external council members, but advises that this should not necessarily exclude academics and students from governance.

Other organisations in New Zealand have small boards. The average size of New Zealand corporate boards fell from 6.6 directors to 5.9 directors between 1995 and 2010. New Zealand's state-owned enterprises (SOEs) have governance boards of between five and nine members.

Three studies that examine the relationship between governance and organisational performance are contradictory in their conclusions about the impact of board size on firm performance. Smaller, shorter Australian and New Zealand studies find that larger board size is correlated with better firm performance. A larger, longer UK study finds that smaller board size is correlated with better firm performance.

In theory, there are five general models for university governance: faculty, corporate, trustee, stakeholder, and amalgam. In practice, universities generally shape governance bodies around more than one model in accordance with their specific and unique needs.

International comparisons show that there is a general move to a skills-based approach to governance in universities overseas, even though there is variance across jurisdictions and universities. Trends are less conclusive regarding council size, with council sizes varying significantly.

Case studies of governance of selected overseas indigenous tertiary education institutions show that institutions often have smaller councils. Councils of selected institutions in the USA show that the majority of members are from affiliated tribes. Councils of selected institutions in Australia and Canada were recently reviewed and reformed.

Te Puni Kōkiri's advice on effective governance of Māori organisations includes that tikanga principles can give direction to board work and can fit alongside governance best practice. Advice also indicates that the size of boards of Māori organisations depends on the mix of skills needed, on representation requirements, and on the size of the organisation.

Problem definition

Changes to ITP governance in 2009 resulted from poor financial and educational performance in the ITP sector. Unlike the situation with ITPs in 2009, there are no immediate issues with financial and educational performance in most New Zealand universities and wānanga. However, tertiary education providers are facing a number of critical challenges. These include:

- Greater competitive pressures from further internationalisation of the education market through the emergence of online provision, particularly Massive Open Online Courses (MOOCs). Students can now access learning opportunities online through elite institutions, such as Harvard University and Stanford University.
- Better responding to areas of high occupational demand. The sector has not proven particularly responsive, even where skills shortages are in high-

skill and high-wage professions, for example, bachelor's-level graduates in information technology and engineering graduates.

- Making strategic investments to enhance their attractiveness to students and emphasise their particular areas of expertise.
- Attracting international students, at a time where competition for students is increasing around the world, particularly as developing nations invest heavily in their university sectors.

Current governance arrangements may not be optimised to best help universities and wānanga build on their current good performance, support the major contributions they make to their communities and to New Zealand's economy, and address some of the challenges they face.

University and wānanga governance is based on a representative stakeholder approach, which does not give universities and wānanga much flexibility over their council membership. In focusing on the representation of stakeholders, council members' capabilities are not prioritised. For example, at least one university and/or wānanga has recently reported having had problems with some members not participating actively in council discussions because of a lack of skills, experience and/or confidence.

Further, councils tend to be large, which may not support efficient decision-making. Large councils can experience problems with poor communication and decision-making and can result in a small faction of council members informally dominating decision-making. For example, at least one university and/or wānanga has recently reported having had these problems.

In directing the Minister to appoint members with management experience to university and wānanga councils, the Act may inadvertently conflate management and governance. In not directing either the Minister or councils to consider how capable council members are at governing universities and wānanga, councils may not be populated by the most appropriate members.

The lack of individual duties and accountabilities means that poor performance from an individual council member could compromise the performance of the council and expose the institution of the Crown to risk. Further, the council's ability to manage its performance is undermined as it cannot remove individual members for poor performance. The council's ability to attract high-performing members may also be compromised without a mechanism to address poor performance in other members. For example, at least one university and/or wānanga has recently reported having had problems with poor attendance from council members, but has not had the ability to address these performance issues.

The section in the Act regarding representation of the central organisations of employers and workers on university councils (sections 171(2)(f)(i) and 171(2)(f)(ii)) is problematic for two reasons:

- The central organisations of employers and workers are to be defined by the Labour Relations Act 1987. This legislation has been repealed. Legal precedence indicates that when there is a reference in an act to repealed legislation, then the act is read as if the repealed legislation is still in force. However, this is unclear.

- The particular wording of the section is unclear as to whether it requires membership on councils as described. The phrase “having regard to the courses provided by the institution” does not specify whether council membership is required and that members should reflect the courses of the institution, or whether council membership is optional and that it could reflect the courses of the institution. Generally, the presence of the word “shall” in section 171(2) has been interpreted as requiring council membership as described. Again, however, this is unclear.

Problems particular to universities and wānanga are described in the following sections.

Universities

The current representative governance model may not meet universities’ needs in the twenty-first century for the following reasons:

- Current settings allow for large councils, which can make decision-making slow and difficult.
- Representative councils prioritise participation rather than the skills, experience or knowledge of council members.
- Representative councils can result in council members with unclear accountabilities (i.e. whether they are accountable to the institution as a whole or the constituency that they represent).
- Council members’ individual duties are not explicit, nor are members held directly accountable for their performance.

Wānanga

The legislative settings for wānanga share some of the problems of universities regarding council size, members’ skills, experience or knowledge, and members’ duties and accountabilities. There are also additional problems for wānanga.

Current governance settings for wānanga were not written with wānanga in mind. When wānanga were established as TEIs in the mid-1990s, they fell under the same governance settings that applied to universities and ITPs. These settings were developed as a one-size-fits-all approach and may no longer be fit for purpose.

The legislative settings for governance do not adequately reflect the wānanga’s unique status under the Act. The membership requirements for wānanga councils are largely prescriptive. They do not necessarily reflect wānanga’s important stakeholders, such as iwi, and do not allow wānanga much flexibility to reflect these stakeholders on their council.

Like universities, current legislative settings for wānanga governance have the potential to make decision-making difficult and result in members with unclear accountabilities, neither of which makes for efficient and effective governance.

International examples

Supplementary research shows examples of university governance reform stemming not from specific problems of council performance, but from general challenges facing the university sector more widely (see appendix three). In the United Kingdom, governance reforms have been, in part, necessitated by financial constraints brought about by decreased government funding and market fluctuations. In Europe, reforms were motivated by the need to respond to problems such as funding cutbacks, inefficiencies, over-regulation and inflexibility.

In Denmark, in particular, university reforms were not made in response to a perceived failure of universities. Both prior to and following the reforms, Danish universities were regarded as among the finest in Europe in both education and research. However, the political view was that the universities could be doing more to produce a highly qualified, globally competitive workforce and to improve both the relevance of their research and the diffusion of that knowledge to the private sector.

One selected example of governance reforms at an indigenous tertiary education institution shows reforms occurring as a result of concerns about board size, inappropriate involvement of certain groups in governance and management, and poor financial management.

Objectives

The objectives of the proposals in this paper are to ensure that universities and wānanga are governed efficiently and effectively. This will be achieved if universities and wānanga have strong and well-equipped governing bodies.

The objectives for the reviews of university and wānanga governance were established separately from each other during the early stages of each review. There are some similarities between the objectives, as outlined below. These objectives are also laid out in the consultation documents for the reviews, available on the Ministry of Education's website here:

<http://www.minedu.govt.nz/theMinistry/Consultation/ReviewofUniversityAndWanangaGovernance.aspx>.

| Objectives for the reviews of university and wānanga governance | |
|--|--|
| For universities, governance settings should: | For wānanga, governance settings should: |
| <ul style="list-style-type: none">• enable councils to be nimble and efficient• equip councils with people highly capable of governing universities• be sufficiently flexible to enable each university to reflect their unique characteristics in their council | <ul style="list-style-type: none">• enable councils to operate effectively and efficiently• equip councils with people highly capable of governing wānanga, defined according to āhuetanga and tikanga Māori, and ensuring wānanga have good educational and financial performance• be sufficiently flexible to enable each wānanga to reflect their unique characteristics in their council, such as iwi stakeholders• reflect the partnership between the Crown and Māori |
| <ul style="list-style-type: none">• clarify duties and accountabilities for individual council members | |

Regulatory impact analysis

The regulatory impact analysis considers a number of options to address the objectives for university and wānanga governance as outlined above.

The first three sections present the options analysis undertaken prior to public consultation:

- Section one presents options to address the first three objectives for universities by examining council size, council membership and members' capabilities.
- Section two presents options to address the first four objectives for wānanga by examining the same parameters of council size, council membership and members' capabilities.
- Section three presents separate options to address the final objective for both universities and wānanga – regarding the duties and accountabilities of individual council members.

These options were informed by conversations between the Minister for Tertiary Education, Skills and Employment and universities and between officials and wānanga, including proposals for change presented by two wānanga.

Following the presentation of this pre-consultation options analysis is a discussion in section four of the key messages that came out of public consultation (the process of the public consultation is addressed in more detail later in this document). The key messages from public consultation informed a further round of options analysis regarding parameters of council size, council membership and members' capabilities.

Therefore, the two sections following present the options analysis undertaken after public consultation:

- Section five presents further options to address the first three objectives for universities, by examining council size, council membership and members' capabilities.
- Section six presents further options to address the first four objectives for wānanga, by examining the same parameters of council size, council membership and members' capabilities.

The key messages from public consultation did not demonstrate a need to address further options to achieve the final objective for university and wānanga governance – regarding individual council members' duties and accountabilities. There was no post-consultation options analysis of further options to address this objective.

The final section of the regulatory impact analysis, section seven, assesses an alternative non-regulatory option for both universities and wānanga.

In addition to key policy matters analysed below (council size, council membership, and members' capabilities; and individual duties and accountabilities) there are a number of other governance-related matters that were examined for possible change. These are not matters that are of direct concern to the reviews of university

and wānanga governance or that directly support the objectives of the reviews. Instead, they are governance-related matters that were reviewed in an effort to consider comprehensive legislative change. As a result, they are not considered as part of this regulatory impact analysis, but are outlined in detail in appendix four.

Section 1: Pre-consultation options assessment regarding council size, council membership, and members' capabilities for universities

Prior to public consultation, six options for council size, council membership, and members' capabilities for universities were considered, as outlined in table one. The options reflect the status quo, the current settings for ITPs, options retaining some or eliminating representation, options changing or maintaining the number of ministerial appointees, and an open approach. All options, except the status quo, require regulatory change.

Table 1: pre-consultation options for university council size, council membership, and members' capabilities

| Option | Detail | | | |
|--|--------------|---|--|------------------------------------|
| | Council size | Members appointed by the Minister | Other members | Chairperson and deputy chairperson |
| 1. Status quo | 12 to 20* | 4 appointed for their management experience | 8 to 16 representing stakeholder groups | Appointed by the council |
| 2. ITP settings | 8 | 4 appointed for their capabilities | 4 appointed by the council for their capabilities | Appointed by the Minister |
| 3. Retaining some legislated representation – change to Ministerial appointees | 8 to 12* | 50% appointed for their capabilities | 50%, including the vice-chancellor, one academic staff member, and one student | Appointed by the Minister |
| 4. No legislated representation – change to Ministerial appointees | 8 to 12* | 50% appointed for their capabilities | 50% appointed for their capabilities | Appointed by the Minister |
| 5. Open approach | ** | 50% appointed for their capabilities | 50% appointed for their capabilities | Appointed by the Minister |
| 6. No legislated representation – no change to Ministerial appointees | 8 to 12* | 4 appointed for their capabilities | 4 to 8 appointed by the council for their capabilities | Appointed by the council |

* To be determined by each university through its constitution.

** To be determined by each university through its constitution and approved by the Minister.

These options were analysed against the objectives for university governance that relate to council size, council membership, and members' capabilities. Table two indicates whether each option meets the objective (✓), somewhat meets the objective (~), or does not meet the objective (×). This analysis of each option is also described in more detail.

Table 2: analysing pre-consultation options for university council size, council membership, and members' capabilities against objectives

| Option | Objectives | | |
|--|---|--|---|
| | Enable councils to be nimble and efficient | Equip councils with people highly capable of governing universities | Be sufficiently flexible to enable each university to reflect their unique characteristics in their council |
| 1. Status quo | x | x | ~ |
| | Larger council size and representational nature limits effectiveness and efficiency | Representative nature means that governance capabilities are not prioritised | Some flexibility around size and membership, somewhat enabling universities to reflect their unique characteristics Prescriptive nature of the membership requirements limits this flexibility Councils appointing chairperson and deputy chairperson enables flexibility |
| 2. ITP settings | ✓ | ✓ | ~ |
| | Council size is sufficiently small to enable effective and efficient operation | Focuses on the governance capabilities of council members | Some flexibility around membership, somewhat enabling universities to reflect their unique characteristics Restrictive size limits this flexibility Minister appointing chairperson and deputy chairperson limits this flexibility |
| 3. Retaining some legislated representation – change to Ministerial appointees | ✓ | ~ | ~ |
| | Council size is sufficiently small to enable effective and efficient operation | Partially focuses on the governance capabilities of council members appointed by the Minister Representative nature means that governance capabilities are not prioritised for members appointed by the council | Some flexibility around size and membership, somewhat enabling universities to reflect their unique characteristics Prescriptive nature of the membership requirements significantly limits this flexibility Minister appointing chairperson and deputy chairperson limits this flexibility |
| 4. No legislated representation – change to Ministerial appointees | ✓ | ✓ | ~ |
| | Council size is sufficiently small to enable effective and efficient operation | Focuses on the governance capabilities of council members | Flexibility around membership, enabling universities to reflect their unique characteristics Minister appointing chairperson and deputy chairperson limits this flexibility |

| Option | Objectives | | |
|---|--|--|---|
| | Enable councils to be nimble and efficient | Equip councils with people highly capable of governing universities | Be sufficiently flexible to enable each university to reflect their unique characteristics in their council |
| 5. Open approach | ~ | ~ | ~ |
| | Dependent on the approach determined by each university in its constitution and approved by the Minister No guidance for universities about what to expect from Ministers or for Ministers about how to assess proposed constitutions | Dependent on the approach determined by each university in its constitution and approved by the Minister No guidance for universities about what to expect from Ministers or for Ministers about how to assess proposed constitutions | Dependent on the approach determined by each university in its constitution and approved by the Minister No guidance for universities about what to expect from Ministers or for Ministers about how to assess proposed constitutions Minister appointing chairperson and deputy chairperson limits flexibility |
| 6. No legislated representation – no change to Ministerial appointees | ✓ | ✓ | ✓ |
| | Council size is sufficiently small to enable effective and efficient operation | Focuses on the governance capabilities of council members | Flexibility around membership, enabling universities to reflect their unique characteristics Councils appointing chairperson and deputy chairperson enables flexibility |

On balance:

- Option 1 does not adequately meet the objectives.
- It is not clear whether option 5 would meet the objectives – it provides significant flexibility to universities, but creates uncertainty for universities about what Ministers might or might not approve. Further, the open nature means that Ministerial approval is likely to involve greater scrutiny.
- Option 3 somewhat meets the objectives.
- Option 2 and 4 meet many of the objectives.
- Option 6 meets all of the objectives.

Section 2: Pre-consultation options assessment regarding council size, council membership, and members' capabilities for wānanga

Six options for council size, council membership, and members' capabilities for wānanga were considered, as outlined in table three. The options reflect the status quo, the current settings for ITPs, proposals by two wānanga ("wānanga A" and "wānanga B"), and two options also considered above for universities. All options, except the status quo, require regulatory change. The options were informed by communication between officials and wānanga.

Table 3: pre-consultation options for wānanga council size, council membership, and members' capabilities

| Option | Detail | | | |
|---|--|---|---|------------------------------------|
| | Council size | Members appointed by the Minister | Other members | Chairperson and deputy chairperson |
| 1. Status quo | 12 to 20* | 4 appointed for their management experience | 8 to 16 representing stakeholder groups ¹ | Appointed by the council |
| 2. ITP settings | 8 | 4 appointed for their capabilities | 4 appointed by the council for their capabilities | Appointed by the Minister |
| 3. Wānanga A's proposal | 8 | 2 appointed for their capabilities | 5 appointed by the council for their capabilities 1 appointed by a group of elders | Appointed by the council |
| 4. Wānanga B's proposal | 8 to 12 ² | 4 appointed for their capabilities | 2 appointed by the council for their capabilities 6 appointed by wānanga B's local iwi | Appointed by the council |
| 5. Open approach | Size and membership to be determined by each wānanga through its constitution and approved by the Minister | | | Appointed by the council |
| 6. No legislated representation – no change to Ministerial appointees | 8 to 12* | 4 appointed for their capabilities | 4 to 8 appointed by the council for their capabilities | Appointed by the council |

* To be determined by each wānanga through its constitution.

These options were analysed against the objectives for wānanga governance that relate to council size, council membership, and members' capabilities. Table four indicates whether each option meets the objective (✓), somewhat meets the objective (~), or does not meet the objective (✗). This analysis of each option is also described in more detail.

¹ The composition is specified in s171 of the Act and requires councils to include members of academic and general staff, the chief executive of the institution, students and representatives of appropriate professional, employer and employee groups.

² Wānanga B's proposal indicated a preference for a council of eight to ten members, but outlined membership for a council of twelve, as it recognised that this is the smallest council permitted under current legislation.

Table 4: analysing pre-consultation options for wānanga council size, council membership, and members' capabilities against objectives

| Option | Objectives | | | |
|-------------------------|---|---|--|---|
| | Enable councils to operate effectively and efficiently | Equip councils with people highly capable of governing wānanga* | Be sufficiently flexible to enable each wānanga to reflect their unique characteristics in their council, such as iwi stakeholders | Reflect the partnership between the Crown and Māori |
| 1. Status quo | x | x | ~ | ~ |
| | Larger council size and representational nature limits effectiveness and efficiency | Representative nature means that governance capabilities are not prioritised Skills or knowledge needed specific to wānanga are not specified, i.e. te reo and tikanga Māori | Some flexibility around size and membership, somewhat enabling wānanga to reflect their unique characteristics Prescriptive nature of the membership requirements limits this flexibility Councils appointing chairperson and deputy chairperson enables flexibility | Proportion of ministerial appointments may not be high enough to reflect the partnership between the Crown and Māori |
| 2. ITP settings | ✓ | ✓ | ~ | ✓ |
| | Council size is sufficiently small to enable effective and efficient operation | Focuses on the governance capabilities of council members | Some flexibility around membership, somewhat enabling wānanga to reflect their unique characteristics Restrictive size limits this flexibility Minister appointing chairperson and deputy chairperson limits flexibility | Proportion of ministerial to council appointments reflects the partnership between the Crown and Māori |
| 3. Wānanga A's proposal | ✓ | ✓ | ✓ | ~ |
| | Council size is sufficiently small to enable effective and efficient operation | Focuses on the capabilities of council members | Flexibility around membership, enabling wānanga to reflect their unique characteristics Membership appointed by a particular group of elders may not be appropriate for all wānanga Councils appointing chairperson and deputy chairperson enables flexibility | Proportion of ministerial appointments (2 out of 8) may not be high enough to reflect the partnership between the Crown and Māori |

| Option | Objectives | | | |
|---|--|--|--|--|
| | Enable councils to operate effectively and efficiently | Equip councils with people highly capable of governing wānanga* | Be sufficiently flexible to enable each wānanga to reflect their unique characteristics in their council, such as iwi stakeholders | Reflect the partnership between the Crown and Māori |
| 4. Wānanga B's proposal | ✓ | ✓ | x | ✓ |
| | Council size is sufficiently small to enable effective and efficient operation | Focuses on the capabilities of council members | Little flexibility around membership, reflecting only the interests of one particular iwi group May be appropriate for wānanga B's council, but would not be appropriate for wānanga that have other founding iwi Councils appointing chairperson and deputy chairperson enables flexibility | Proportion of ministerial to council appointments reflects the partnership between the Crown and Māori |
| 5. Open approach | ~ | ~ | ~ | ~ |
| | Dependent on the approach determined by each wānanga in its constitution and approved by the Minister No guidance for wānanga about what to expect from Ministers or for Ministers about how to assess proposed constitutions | Dependent on the approach determined by each wānanga in its constitution and approved by the Minister No guidance for wānanga about what to expect from Ministers or for Ministers about how to assess proposed constitutions | Dependent on the approach determined by each wānanga in its constitution and approved by the Minister No guidance for wānanga about what to expect from Ministers or for Ministers about how to assess proposed constitutions Councils appointing chairperson and deputy chairperson enables flexibility | Dependent on the approach determined by each wānanga in its constitution and approved by the Minister No guidance for wānanga about what to expect from Ministers or for Ministers about how to assess proposed constitutions |
| 6. No legislated representation – no change to Ministerial appointees | ✓ | ✓ | ✓ | ✓ |
| | Council size is sufficiently small to enable effective and efficient operation | Focuses on the governance capabilities of council members | Flexibility around membership, enabling wānanga to reflect their unique characteristics Councils appointing chairperson and deputy chairperson enables flexibility | Proportion of ministerial to council appointments reflects the partnership between the Crown and Māori |

* Defined according to āhukatanga and tikanga Māori, and ensuring wānanga have good educational and financial performance

On balance:

- Option 1 does not adequately meet the objectives.
- It is not clear whether option 5 would meet the objectives – it provides significant flexibility to wānanga, but create uncertainty for wānanga about what Ministers might or might not approve. Further, the open nature means that Ministerial approval is likely to involve greater scrutiny.
- Options 2, 3 and 4 meet many of the objectives.
- Option 6 meets all of the objectives.

Section 3: Options assessment regarding individual duties and accountabilities for universities and wānanga

One option for specifying individual council members' duties was considered. This option is consistent with the duties of members of boards of statutory entities as outlined in the Crown Entities Act 2004 (sections 54 to 57) and with the duties of individual ITP council members as established by the governance reforms in 2009. In particular, individual members would be under a duty:

- to act with honesty and integrity
- to act in good faith and not at the expense of the institution's interests
- to act with reasonable care, diligence, and skill
- not to disclose information.

Five options for holding individual council members accountable for performing against their duties were considered. The first four are outlined in table five and involve removing individual council members who fail to fulfil their duties.

Table 5: options for removing individual council members

| Option | Detail |
|---|--|
| 1. ITP settings | The Minister may, with just cause ³ , remove an individual council member |
| 2. Minister removes members at council's recommendation | The Minister may, with just cause and at the recommendation of a council, remove an individual council member |
| 3. Council removes members | The council may, with just cause and by council resolution, remove an individual council member |
| 4. Split approach | The Minister may, with just cause, remove an individual council member who is a ministerial appointee The council may, with just cause and by council resolution, remove any other council member |

We have analysed these options against assessment criteria that reflect the objectives for the reviews of university and wānanga governance. Table six indicates whether each option meets the assessment criteria (✓), somewhat meets the assessment criteria (~), or does not meet the assessment criteria (×).

³ To be defined consistent with the settings for ITPs as misconduct, inability to perform the functions of office, neglect of duty or breach of any of the collective duties of the council or the individual duties of members.

Table 6: analysing options for removing individual council members

| Option | Assessment Criteria | | | |
|---|---|---|--|---|
| | 1. Reflect and protect the Crown's ownership interests in universities and wānanga | 2. Better enable councils to manage their own performance | 3. Enable councils to operate effectively and efficiently | 4. Equip councils with people highly capable of governing universities and wānanga |
| 1. ITP settings | ✓ | x | ✓ | ✓ |
| | Poor performance that could compromise the performance of the council and expose the Crown to risk could be addressed, and assigning the accountability mechanism to the Minister reflects the Crown's ownership interests | Council performance could be enhanced by the removal of poor performing members, but a council is not able to manage this itself | Individual council members would be held accountable for their performance, encouraging high performance and supporting effectiveness and efficiency | The ability of a council to attract high-performing members may be enhanced with a mechanism to address poor performance in other members |
| 2. Minister removes members at council's recommendation | ✓ | ✓ | ✓ | ✓ |
| | Poor performance that could compromise the performance of the council and expose the Crown to risk could be addressed, and assigning the accountability mechanism to the Minister reflects the Crown's ownership interests | Council performance could be enhanced by the removal of poor performing members, and a council is able to manage this itself | Individual council members would be held accountable for their performance, encouraging high performance and supporting effectiveness and efficiency | The ability of a council to attract high-performing members may be enhanced with a mechanism to address poor performance in other members |
| 3. Council removes members | ~ | ✓ | ✓ | ✓ |
| | Poor performance that could compromise the performance of the council and expose the Crown to risk could be addressed, but assigning the accountability mechanism to the council does not reflect the Crown's ownership interests | Council performance could be enhanced by the removal of poor performing members, and a council is able to manage this itself | Individual council members would be held accountable for their performance, encouraging high performance and supporting effectiveness and efficiency | The ability of a council to attract high-performing members may be enhanced with a mechanism to address poor performance in other members |
| 4. Split approach | ~ | ~ | ✓ | ✓ |
| | Poor performance that could compromise the performance of the council and expose the Crown to risk could be addressed, but assigning the accountability mechanism partially to the Minister only partially reflects the Crown's ownership interests | Council performance could be enhanced by the removal of poor performing members, but a council is only partially able to manage this itself | Individual council members would be held accountable for their performance, encouraging high performance and supporting effectiveness and efficiency | The ability of a council to attract high-performing members may be enhanced with a mechanism to address poor performance in other members |

On balance:

- Options 1, 3 and 4 meet some of the assessment criteria.
- Option 2 meets all of the assessment criteria.

There is a risk that any Ministerial involvement in the removal of council members would send a signal to the sector of greater Ministerial control over councils. This could be mitigated by ensuring that the removal process would be instigated by the council and that removal could only occur at the recommendation of the council.

In addition to these four options for removing individual council members who fail to fulfil their duties, a fifth option was considered for addressing individual council members who breach an individual duty:

- The council would have the ability to bring an action against a member for breach of any individual duty.

This would allow councils to manage their performance and would enable them to intervene in performance issues before they might result in a council member needing to be removed from a council for failing to fulfill their duties.

Section 4: Key messages from public consultation

Public consultation on university and wānanga governance sought feedback on the following proposed changes to university and wānanga governance, in line with option 6, regarding council size, council membership, and members' capabilities, outlined above in tables one to four, and in line with the duties and accountabilities discussed in section three. Specifically, the consultation document proposed the following changes to university and wānanga governance:

- Decrease council size from 12 to 20 members to 8 to 12 members.
- Make council membership requirements more flexible by eliminating required representational membership.
- Require the Minister and councils to appoint council members with the skills to govern universities and wānanga.
- Clarify the duties and accountabilities of individual council members.

This section presents an initial summary of submissions. At the time of drafting this paper, analysis of submissions was ongoing, and a report presenting the full and final analysis is planned for public release early in 2014.

Particularly, the majority of individual submitters and key peak-body and union organisations are opposed to the proposed changes. Some submitters explicitly stated a preference for the status quo, and the nature of other responses suggests that the proportion of submitters who prefer the status quo is higher than those who explicitly stated it.

Universities are mixed in their opposition and support for the proposed changes. Three universities prefer the status quo. Five universities support change along the

lines of the proposals in the consultation document, but with all preferring different council sizes and/or fewer Ministerial appointees.

Support from wānanga is mixed. Two wānanga generally support the proposal and actively seek legislative change. One wānanga is not actively seeking change, but does not necessarily oppose the changes proposed in the consultation document.

Key themes across submissions

Generally, there was concern that the consultation document did not provide sufficient detail regarding the rationale for change/problem definition, the proposals themselves, and evidence to support the rationale and proposals for change. Some expressed concern that the solution was predetermined and that there is not any particular problem that it solves.

There was also general concern that the proposals, especially for changes to university governance, do not recognise the characteristics of universities and wānanga that are unique from other organisations (ITPs and private-sector companies, for example), including that they are complex organisations with drivers beyond profit.

Many respondents expressed concern that changes to governance would negatively impact institutional autonomy and academic freedom. Many indicated that the democratic election of staff, student and community representation on councils is important to institutional characteristics, such as institutional autonomy and academic freedom.

Generally, it was indicated that the specific characteristics and complexities of universities and wānanga required larger councils that included representation of stakeholders. Concern was expressed that smaller councils without required representational membership would lack diversity of skills, experience and background to sufficiently link universities to their stakeholders and their communities. Concern also focused on the increased proportion of Ministerial appointees on councils and that this could increase Government involvement in decision-making, result in less diversity on councils, and result in councils treating universities and wānanga like businesses.

Some saw the benefits of smaller councils, but many did not necessarily think that larger councils posed significant problems.

Many explained that staff and student representation on councils was valuable in informing council decision-making and in facilitating strong links between councils and these key stakeholders. Staff and students particularly expressed concern that without required representation on councils, there would not be other robust mechanisms in place for them to inform and understand council decisions.

There was some recognition that council members should have the appropriate knowledge, skills or experience to govern universities and wānanga, as long as this was broadly defined. Many indicated that university and wānanga councils already made use of co-opted members to ensure their council members had the necessary knowledge, skills or experience to govern. Concern was expressed that focusing on skills or experience would exclude students and/or staff from councils, when their particular knowledge is valuable on councils. All three wānanga have emphasised

the importance that all council members be competent in āhuatanga, tikanga and/or te reo Māori.

Concern about clarifying the duties and accountabilities of council members was less significant than with other aspects of the proposal. Submitters generally supported the proposal, felt that provisions outlining duties and accountabilities were already in place, or expressed concern that the proposal was not specific enough about the nature of the proposed change.

Section 5: Post-consultation options assessment regarding council size, council membership, and members' capabilities for universities and wānanga

After public consultation, ten options for council size, council membership, and members' capabilities for universities and wānanga were considered, as outlined in table seven. The options reflect the status quo, a modified status quo, the consultation proposal, and seven modifications to the consultation proposal based on alternative options suggested by universities and wānanga in their submissions. All options, except the status quo, require regulatory change.

(Note: two universities proposed an alternative option that would involve no limits in legislation regarding the size of university councils. This open approach was assessed as an option during pre-consultation analysis as discussed above. It was unclear whether this option would meet the objectives for the review. While it may provide flexibility to universities, it would create uncertainty for universities about what Ministers might or might not approve regarding council size. It also risks institutions opting for very large councils. Since this "open approach" has already been discounted, it has not been re-assessed as a post-consultation option.)

While universities and wānanga are very different institutions, the objectives for the reviews of university and wānanga governance are similar, and the proposals analysed below are flexible so as to have the potential to enable these two different types of institutions to reflect their unique characteristics on their councils within the same broad settings. Therefore, this section presents an analysis of options for university and wānanga governance together, rather than separately as with the pre-consultation options analysed earlier in this paper.

These options were analysed against the objectives for university and wānanga governance that relate to council size, council membership, and members' capabilities. Table eight indicates whether each option meets the objective (✓), somewhat meets the objective (~), or does not meet the objective (×). The analysis of each option is also described in more detail.

Table 7: post-consultation options for universities and wānanga council size, council membership, and members' capabilities

| Option | Detail | | | |
|---|--------------|---|---|------------------------------------|
| | Council size | Members appointed by the Minister | Other members | Chairperson and deputy chairperson |
| 1. Status quo | 12 to 20* | 4 appointed for their management experience | 8 to 16 representing stakeholder groups | Appointed by the council |
| 2. Modified status quo | 12 to 20* | 4 appointed for their capabilities | 8 to 16 representing stakeholder groups (requirements to have representatives from employer and worker groups removed) and with consideration given to their capabilities | Appointed by the council |
| 3. Consultation proposal (CP) | 8 to 12* | 4 appointed for their capabilities | 4 to 8 appointed by the council for their capabilities | Appointed by the council |
| 4. Modified CP 'A' – $\frac{1}{3}$ Ministerial appointees, no representational membership | 8 to 14* | No more than $\frac{1}{3}$ of members appointed by the Minister for their capabilities | remaining members appointed by the council for their capabilities | Appointed by the council |
| 5. Modified CP 'B' – $\frac{1}{3}$ Ministerial appointees, representational membership for staff and students | 8 to 14* | No more than $\frac{1}{3}$ of members appointed by the Minister for their capabilities | remaining members appointed by the council for their capabilities, including at least one academic staff member and one student | Appointed by the council |
| 6. Modified CP 'C' – 3 Ministerial appointees, no representational membership | 8 to 14* | 3 appointed for their capabilities | 5 to 11 appointed by the council for their capabilities | Appointed by the council |
| 7. Modified CP 'D' – 3 Ministerial appointees, representational membership for staff and students | 8 to 14* | 3 appointed for their capabilities | 5 to 11 appointed by the council for their capabilities, including at least one academic staff member and one student | Appointed by the council |
| 8. Modified CP 'E' – 3 or 4 Ministerial appointees, no representational membership | 8 to 14* | For councils of 8 to 10 members: 3 appointed for their capabilities For councils of 11 to 14 members: 4 appointed for their capabilities | 5 to 10 appointed by the council for their capabilities | Appointed by the council |
| 9. Modified CP 'F' – 3 or 4 Ministerial appointees, representational membership for staff and students | 8 to 14* | For councils of 8 to 10 members: 3 appointed for their capabilities For councils of 11 to 14 members: 4 appointed for their capabilities | 5 to 10 appointed by the council for their capabilities, including at least one academic staff member and one student | Appointed by the council |
| 10. Modified CP 'G' – $\frac{1}{4}$ Ministerial appointees, no representational membership | 8 to 12* | No more than $\frac{1}{4}$ of members appointed for their capabilities | remaining members appointed by the council for their capabilities | Appointed by the council |

* To be determined by each university and wānanga through its constitution.

Table 8: analysing post-consultation options for university and wānanga council size, council membership, and members' capabilities against objectives

| Option | Objectives | | | Reflect the partnership between the Crown and Māori (analysed for wānanga only) |
|---|---|--|--|---|
| | Enable councils to operate effectively and efficiently | Equip councils with people highly capable of governing universities and wānanga | Be sufficiently flexible to enable each university and wānanga to reflect their unique characteristics in their council | |
| 1. Status quo | x | x | ~ | ~ |
| | Larger council size and representational nature limits effectiveness and efficiency | Representative nature means that governance capabilities are not prioritised | Some flexibility around size and membership, somewhat enabling universities and wānanga to reflect their unique characteristics Prescriptive nature of the membership requirements limits this flexibility | Proportion of ministerial appointments may not be high enough on larger councils to reflect the partnership between the Crown and Māori |
| 2. Modified status quo | x | ~ | ~ | ~ |
| | Larger council size and representational nature limits effectiveness and efficiency | Representative nature means that governance capabilities can be considered, but not prioritised Some flexibility around size and membership means more scope for co-option to meet skills needs | Some flexibility around size and membership, somewhat enabling universities and wānanga to reflect their unique characteristics More prescriptive nature of the membership requirements limits this flexibility Addresses lack of clarity regarding employer and worker groups on councils | Proportion of ministerial appointments may not be high enough on larger councils to reflect the partnership between the Crown and Māori |
| 3. Consultation proposal | ✓ | ✓ | ✓ | ✓ |
| | Council size is sufficiently small to enable effective and efficient operation | Focuses on the governance capabilities of council members | Flexibility around membership, enabling universities and wānanga to reflect their unique characteristics | Proportion of ministerial to council appointments reflects the partnership between the Crown and Māori |
| 4. Modified CP 'A' – 1/3 Ministerial appointees, no representational membership | ✓ | ✓ | ✓ | ✓ |
| | Council size is sufficiently small to enable effective and efficient operation | Focuses on the governance capabilities of council members | Flexibility around membership, enabling universities and wānanga to reflect their unique characteristics | Proportion of ministerial to council appointments reflects the partnership between the Crown and Māori |
| 5. Modified CP 'B' – 1/3 Ministerial appointees, some representational membership | ✓ | ✓ | ~ | ✓ |
| | Council size is sufficiently small to enable effective and efficient operation | Focuses on the governance capabilities of council members More prescriptive nature of the membership limits the focus on capability | Some flexibility around size and membership, somewhat enabling universities and wānanga to reflect their unique characteristics More prescriptive nature of the membership requirements limits this flexibility | Proportion of ministerial to council appointments reflects the partnership between the Crown and Māori |

| Option | Objectives | | | Reflect the partnership between the Crown and Māori (analysed for wānanga only) |
|--|--|--|--|---|
| | Enable councils to operate effectively and efficiently | Equip councils with people highly capable of governing universities and wānanga | Be sufficiently flexible to enable each university and wānanga to reflect their unique characteristics in their council | |
| 6. Modified CP 'C' – 3 Ministerial appointees, no representational membership | ✓ | ✓ | ✓ | ~ |
| | Council size is sufficiently small to enable effective and efficient operation | Focuses on the governance capabilities of council members | Flexibility around membership, enabling universities and wānanga to reflect their unique characteristics | Proportion of ministerial appointments may not be high enough on larger councils to reflect the partnership between the Crown and Māori |
| 7. Modified CP 'D' – 3 Ministerial appointees, some representational membership | ✓ | ✓ | ~ | ~ |
| | Council size is sufficiently small to enable effective and efficient operation | Focuses on the governance capabilities of council members More prescriptive nature of the membership limits the focus on capability | Some flexibility around size and membership, somewhat enabling universities and wānanga to reflect their unique characteristics More prescriptive nature of the membership requirements limits this flexibility | Proportion of ministerial appointments may not be high enough on larger councils to reflect the partnership between the Crown and Māori |
| 8. Modified CP 'E' – 3 or 4 Ministerial appointees, no representational membership | ✓ | ✓ | ✓ | ✓ |
| | Council size is sufficiently small to enable effective and efficient operation | Focuses on the governance capabilities of council members | Flexibility around membership, enabling universities and wānanga to reflect their unique characteristics | Proportion of ministerial to council appointments reflects the partnership between the Crown and Māori |
| 9. Modified CP 'F' – 3 or 4 Ministerial appointees, some representational membership | ✓ | ✓ | ~ | ✓ |
| | Council size is sufficiently small to enable effective and efficient operation | Focuses on the governance capabilities of council members More prescriptive nature of the membership limits the focus on capability | Some flexibility around size and membership, somewhat enabling universities and wānanga to reflect their unique characteristics More prescriptive nature of the membership requirements limits this flexibility | Proportion of ministerial to council appointments reflects the partnership between the Crown and Māori |
| 10. Modified CP 'G' – ¼ Ministerial appointees, no representational membership | ✓ | ✓ | ✓ | ~ |
| | Council size is sufficiently small to enable effective and efficient operation | Focuses on the governance capabilities of council members | Flexibility around membership, enabling universities and wānanga to reflect their unique characteristics | Proportion of ministerial appointments may not be high enough to reflect the partnership between the Crown and Māori |

On balance, options 1 and 2 do not adequately meet the objectives for the reviews of university and wānanga governance.

Options 5, 6, 7, 9 and 10 meet some or most of the objectives.

Options 3, 4 and 8 meet all of the objectives. These options have the following marginal differences:

- Option 3 may result in marginally more efficiency, as the council size is somewhat smaller.
- Options 4 and 8 would result in marginally more flexibility, as the maximum council size is somewhat larger.
- The proportion of Ministerial appointees would be highest for option 3 and lowest for option 4:
 - Option 3: between 33.33% and 50%.
 - Option 4: between 25% and 33.33%.
 - Option 8: between 28.6% and 37.5%.

Section 6: Alternative option: non-regulatory approach

A non-regulatory mechanism available to try to change university and wānanga governance could involve publishing more explicit guidance on the roles of council members. This would see university and wānanga councils informed on the principles of good governance, and encouraged to minimise council sizes (within current legislative settings) and to appoint council members with governance skills and experience, within the limits of the Act.

Further, this guidance could inform risk and audit committees (which all universities and wānanga have established already as committees to the council) of appropriate accountability settings to ensure adequate performance from individual council members. Well-functioning risk and audit committees could have a positive impact on university and wānanga governance by reviewing governance practices and establishing internal accountability settings. (Legislation permits universities and wānanga to establish such a committee of their own accord. The Crown has no mandate to establish or control such committees.)

This option is insufficient to have positive and comprehensive change on university and wānanga governance. Without legislative change, there would be no mechanism to ensure that universities and wānanga adopt the guidance published. This non-regulatory option was implemented for universities in 2000 in lieu of legislative change to governance settings. The then Minister for Tertiary Education wrote to university council members expressing expectations for their performance. This effort is thought to have had little impact. Further, the Tertiary Education Commission and the State Services Commission already issue guidance on the governance of Crown entities and tertiary education organisations. This guidance has limited reach given that institutions are not bound by it.

Because there is no mechanism to ensure that universities and wānanga adopt the guidance published, this option is no different than the status quo. As the analysis

above indicates, the status quo does not adequately meet the objectives for the reviews of university and wānanga governance.

Conclusion and recommendation

We have identified three options for university and wānanga governance that meet the objectives for the reviews. All three options require legislative change – analysis shows that the status quo does not sufficiently meet the objectives for university and wānanga governance.

Based on the optimal options identified for university and wānanga governance, we recommend legislative change as follows for the four key policy decisions regarding council size, council membership, members' capabilities, and members' individual duties and accountabilities:

- council size be reduced to between either 8 to 12 members or 8 to 14 members
- the Minister appoint either:
 - no more than one-third of council members
 - three members on councils of 8 to 10 members and four members on councils of 11 to 14 members
 - four council members

councils appoint remaining members

- the Minister and councils appoint members with skills, knowledge or experience that make them capable of governing universities or wānanga
- the duties of council members be outlined consistent with the Crown Entities Act 2004
- the Minister be able to, with just cause, and at the recommendation of a council, remove an individual council member for failing to fulfil their duties
- councils be able to bring an action against a member for breach of any individual duty.

This recommendation is in line with post-consultation options 3, 4 and 8 outlined in tables seven and eight regarding council size, council membership, and members' capabilities, and with option 2 outlined in tables five and six regarding removing council members.

We note that at least three universities, at least one wānanga, and some peak-body and union organisations and individuals will be more supportive of change if:

- the maximum size of councils is 14 rather than 12
- the number of Ministerial appointees is reduced from the status quo (four).

We do not view a significant difference between the options of no more than one-third of council members being Ministerial appointees and three or four Ministerial appointees according to council size. However, the slightly higher proportions that would result from three or four Ministerial appointees according to council size may better reflect the Government's ownership interests in, and financial support for, universities and wānanga.

Risks

There are significant risks with proceeding with our recommended changes to university and wānanga governance. It is likely that any reduction in council size and the elimination of required representational membership will be met with opposition from some universities, most union and peak-body organisations, and many individuals.

Concern is likely to focus on similar matters to the key themes that arose from public consultation, presented above as part of the regulatory impact analysis. This includes concerns that:

- there is insufficient evidence to support the rationale for change and the specific changes recommended above
- the changes recommended do not recognise the characteristics of universities and wānanga that are unique from other organisations and could result in universities and wānanga being treated like businesses
- the changes recommended would negatively impact institutional autonomy and academic freedom
- without students and staff on university and wānanga councils:
 - councils would lack diversity of skills, experience and background
 - links between universities and wānanga and their communities would be weakened
 - links between councils and students and staff would be weakened
 - they would not have a mechanism by which to inform and understand council decisions.

Some of the risk around these matters could be mitigated in the way any change is described.

For example, it should be emphasised that university and wānanga stakeholders, such as staff and students, remain crucial to these institutions, and their views will need to continue to be taken into account in councils' decision-making. Councils could choose to establish committee structures to enable engagement with stakeholders, and that councils are required to consider advice from their academic board, which includes student and staff members, on academic matters.

It could also be emphasised that the proposed changes are intended to make council membership more flexible than it is currently, and that this allows universities and wānanga to better reflect their particular unique characteristics on their councils.

Further, it could be noted that the changes will not impact on institutional autonomy and academic freedom, which are guaranteed by the Act.

Staff and students may feel particularly disenfranchised by the elimination of required representational membership from university and wānanga councils. Their reactions to legislative change may be significant and may mean that the costs of change could erode the benefits.

Some of this risk could be mitigated by maintaining required representational membership of at least one academic staff member and one student on councils, in keeping with options 5 and 9 outlined in tables seven and eight. However, we have already identified that this would limit the flexibility of council membership for university and wānanga councils, especially those who have indicated they would prefer councils without staff and student members.

The limited submissions received regarding wānanga governance mean that it is unclear to what extent staff, students, and other individuals affiliated with wānanga would support or oppose change, and to what extent any opposition could be mitigated by retaining some required representational membership.

Implementation

Transitional arrangements are required to give university and wānanga councils sufficient time to implement any required changes, including amending their constitutions and appointing new council members. Universities and wānanga may also wish to make changes to their council committee structures and other council-related matters, as determined in their statutes.

Universities and wānanga will require time to think strategically about how to structure their councils in accordance with new legislation. It is important that the new councils be as strong and capable as they can be once they are implemented. The transition period described in this section will give universities and wānanga the opportunity to transition to a new council structure immediately after legislation is enacted, if they are ready, or, if they need it, the opportunity to take significant time to plan their new council.

If new legislation is enacted in 2014, new councils could be in place on or before 1 January 2016. A transition period would be in place from the day that the Education Amendment Bill 2013 is enacted (likely mid-2014) until 1 January 2016.

During this period, universities and wānanga councils will establish new constitutions consistent with new legislation. The Minister will confirm the new constitution by notice in the *Gazette*. The new constitution will include a reconstitution date for the council that is no later than 1 January 2016. If the council fails to provide a draft constitution for approval within two months prior to the end of the transition period (1 January 2016), then the Minister will determine the new constitution by notice in the *Gazette*.

Before each council's reconstitution, the Minister must appoint council members according to new legislation and to each council's constitution. Other members may be appointed before the date of reconstitution and must be appointed no later than three months after the date of reconstitution. All members of the existing council will vacate office on the day before the date of reconstitution, and the new members take office on the date of reconstitution.

There will be no right to compensation for loss of office in respect of the non-appointment of existing council members to the new council.

The new council will be the same body as the council immediately prior to the date of reconstitution and will have all of the same rights and obligations the council had immediately prior to the date of reconstitution. Any decisions or actions by the former council will be treated as if they were decisions or actions taken by the new council.

The Minister will have a temporary power to give directions on any matters to assist in facilitating the transfer of responsibility to the new council, and the existing council must give effect to those directions.

The Tertiary Education Commission (TEC) will work with universities and wānanga during implementation to help to ensure that transitions to new councils are smooth.

Monitoring, evaluation, and review

The TEC, responsible for monitoring TEIs, has mechanisms in place to monitor and evaluate the success of changes to TEI governance settings. These mechanisms include formal reviews of the efficiency and effectiveness of governance settings. The TEC will monitor and evaluate changes to university governance settings after the changes have been implemented.

This will be undertaken through a formal review that may take a similar format as is in place for reviewing the recent changes to ITP governance. To review ITP governance, the TEC is undertaking a three-stage evaluation, examining the impacts of change in the short term (one to two years), the medium term (two to three years) and the long term (five years and beyond).

The Government may also be able to monitor the impacts of governance changes by examining the financial and educational performance of universities and wānanga, and by examining the international rankings of universities. These performance measures are already monitored regularly.

Appendix One: Governance settings for universities and wānanga and for ITPs

| Current governance settings for universities and wānanga | Current governance settings for ITPs |
|--|--|
| Composition of councils | |
| <p>12 to 20 members including:</p> <ul style="list-style-type: none"> • 4 persons appointed by the responsible Minister • the chief executive • 1 to 3 academic staff • 1 to 3 general staff • 1 to 3 students • 1 representing the central organisation of employers • 1 representing the central organisation of workers • if appropriate, 1 or more representatives of professional bodies. | <p>8 members including:</p> <ul style="list-style-type: none"> • 4 persons appointed by the responsible Minister • 4 members appointed by the council in accordance with its statutes. |
| <p>The council must elect a chairperson and deputy chairperson for a term of one year from among its members, though not from among the chief executive, staff or students.</p> | <p>The responsible Minister may appoint a chairperson and deputy chairperson, though not from the chief executive, students or employees of the chief executive.</p> |
| <p>Not explicit that a person may be a member of more than one council.</p> | <p>Specifically states that a person may be a member of more than one council.</p> |
| <p>The council should, as far as possible, be representative of the ethnic, gender and socio-economic constitution of the community it serves.</p> | <p>The council should, as far as possible, be representative of the ethnic and socio-economic diversity of the community it serves; and, include Māori.</p> |
| <p>The council should, as far as possible, reflect that approximately half the population of NZ is male and half is female.</p> | <p>-</p> |
| <p>The Minister should, as far as practicable, appoint council members with management experience to enable the council to perform its functions.</p> | <p>The responsible Minister must appoint members with governance experience that equips them to fulfil their duties and should consider ethnic and socio-economic diversity, and Māori when making appointments.</p> |
| <p>-</p> | <p>The council must appoint members with relevant knowledge, skills or experience and who are likely to be able to fulfil their duties.</p> |
| <p>On recommendation from the council, the Minister shall amend the constitution by notice in the <i>Gazette</i>.</p> | <p>-</p> |
| Functions and duties of the council | |
| <p>The functions of the council are:</p> <ul style="list-style-type: none"> • to appoint a chief executive and monitor his or her performance • to prepare and submit investment plans to the TEC, if required • if there is a plan, to ensure that the institution is managed in accordance with the plan, and to determine policies to implement the plan • to determine the institution's management policies • to undertake strategic planning. | |

| Current governance settings for universities and wānanga | Current governance settings for ITPs |
|--|--|
| <p>The duties of the council are:</p> <ul style="list-style-type: none"> to strive to ensure the institution “attains the highest standards of excellence in education, training and research” to acknowledge the principles of the Treaty of Waitangi to encourage participation, to maximise the educational potential of members of the community, with emphasis on under-represented groups to ensure the institution does not discriminate unfairly against anyone to ensure the institution operates in a financially responsible manner and maintains its long-term viability to ensure proper standards are maintained with respect to integrity, conduct, and concern for the public good and the well-being of the student body. | |
| Duties of the council members and accountability for individual duties | |
| - | Includes: members must act with honesty and integrity, in good faith, and with reasonable care, diligence, and skill. |
| - | Council members are accountable for duties; the responsible Minister may, for just cause, remove a council member who does not comply with his or her duties, including the chair and deputy chair; the council may bring action against a council member for breach of any individual duty. |
| Combined councils and combined academic boards | |
| - | The responsible Minister can combine councils of 2 or more polytechnics at the recommendation of the involved institutions; the responsible Minister can dissolve a combined council upon its recommendation. |
| - | Councils can create combined academic boards. |
| Miscellaneous provisions | |
| Constitutions must limit the number of occasions a person may serve as a council member. | Any member can be reappointed for a second term or later. |
| The standard term of office for council members is four years, excluding for students, who hold office for one year, and for co-opted members, who hold office for a period not to exceed four years. | Council members serve a term of office of no more than four years. |
| If a council member leaves office before the end of their term, their successor is only appointed to the end of their predecessor’s term. | |
| - | Any person who has been removed from a council be ineligible for future appointment. |
| Determination of policy | |
| <p>The consultation requirements for councils are:</p> <ul style="list-style-type: none"> in determining the policy of an institution, to consult with any board, committee, or other body established within the institution that has responsibility for giving advice with respect to that matter to establish an academic board consisting of the chief executive, staff and students to advise the council with respect to academic matters and to exercise powers delegated to it by the council to not make any decision with respect to any academic matter unless it has requested and considered the advice of the academic board. | |

Appendix Two: Council membership by university and wānanga

| Institution | Total | Member breakdown | | | | | | | | |
|-----------------------------------|-------|------------------|----------------|---------------|----------|------------------------|----------------------|--------|---------------------------------------|--------------------------|
| | | ex officio | academic staff | general staff | students | representing employers | representing workers | alumni | appointed by the responsible Minister | appointed by the council |
| University of Auckland | 18 | 1 | 3 | 1 | 2 | 0 | 0 | 3 | 4 | 4 |
| Auckland University of Technology | 15 | 1 | 2 | 1 | 2 | 1 | 1 | 0 | 4 | 3 |
| Lincoln University | 19 | 1 | 2 | 1 | 2 | 1 | 1 | 2 | 4 | 5 |
| Massey University | 16 | 1 | 3 | 1 | 3 | 0 | 0 | 2 | 4 | 2 |
| University of Canterbury | 18 | 1 | 2 | 1 | 1 | 1 | 1 | 4 | 4 | 3 |
| University of Otago | <20 | 1 | 3 | 1 | 2 | 1 | 1 | 3 | 4 | <4 |
| University of Waikato | 18 | 1 | 2 | 1 | 1 | 1 | 1 | 0 | 4 | 7 |
| Victoria University of Wellington | 20 | 1 | 3 | 1 | 2 | 1 | 1 | 4 | 4 | 3 |
| Te Wānanga o Aotearoa | 17 | 1 | 1 | 1 | 1 | 1 | 1 | 0 | 4 | 7 |
| Te Wānanga o Raukawa | 17 | 1 | 1 | 1 | 1 | 0 | 0 | 0 | 4 | 9 |
| Te Whare Wānanga o Awanuiarangi | 17 | 1 | 1 | 1 | 1 | 0 | 0 | 0 | 4 | 9 |

Membership counts were collected from institutions' constitutions and websites mid-2013

Appendix Three: Supplementary research

This section includes details of research gathered on the following subjects:

- General
 - previous reviews of TEI governance in New Zealand
 - good governance principles
 - best practices for TEI and university governance
 - governance of other organisations in New Zealand
 - the relationship between governance and organisational performance
- Universities
 - models of university governance
 - governance of overseas universities
- Wānanga
 - governance of overseas indigenous tertiary education institutions
 - effective governance of Māori organisations.

General

Previous reviews of TEI governance in New Zealand

Summary

This section presents short summaries of previous reviews of TEI governance in New Zealand. These documents show different viewpoints on TEI governance and the need for reform. The TEC's 2011 review of changes to ITP governance shows positive impacts. The 1998 White Paper (and the Green Paper preceding it) recommends smaller, skills-based councils. The 2001 TEAC review recommends a further review of governance and shows some support for a skills-based approach. The 2003 Edwards review (likely coming out of the TEAC's recommendations for a review of governance) shows support for a skills-based approach to governance, but does not recommend changes to council size. Other literature supports the current representative model.

2011: "Review of Governance Change: Evaluation of the implementation and short-term outcomes of the change," Tertiary Education Commission.

This report shows that the 2009 reforms to ITP governance have resulted in more capable ITP councils. Since the 2009 governance reforms and other simultaneous efforts to boost ITP performance, ITPs show improvements across several dimensions including risk ratings, financial performance measures, and educational

performance measures. The TEC is continuing to assess the impacts of the 2009 reforms and intends to release a further report.

2003: Meredith Edwards, "Review of New Zealand tertiary education institution governance," Ministry of Education.

This report presents findings of an independent review of governance and ownership of NZ TEIs. It finds that "the governance practice of TEIs in NZ is not seriously flawed, but there is considerable room for improvement, particularly in clarifying the roles and responsibilities of councils and their members, improving the balance between councils, CEs and academic boards, sharing of good governance practice across the sector and optimising the role of stakeholders in tertiary governance."

The report recommends:

- a National Protocol on TEI Governance be developed through a working group and included in legislation
- the development of Institutional Codes of Governance Practice
- the establishment of an Association of Chancellors and Chairs to oversee the protocol and codes
- legislative changes to improve the accountability of councils and to clarify the duties and accountabilities of council members
- that council size stays as is and that individual TEI councils ensure through their constitutions that their councils have members with the appropriate skills
- that councils have a majority of external members
- that the recommended National Protocol states the need for TEIs to have systematic process for identifying the skills and attributes needed among council members.

The report makes a number of other recommendations to improve processes and accountability through the recommended National Protocol.

2001: "Shaping the funding framework," Fourth report of the Tertiary Education Advisory Commission (TEAC).

TEAC recommends that a review of TEI governance be undertaken. The report notes that some TEAC members support a model of governance based on competence, with a clear delineation between governance and management, and with clear accountabilities to Government and stakeholders. It also notes that some members support the current representative model and other members support a mixed model.

1998: "Tertiary education in New Zealand: Policy directions for the 21st century (White Paper)," Ministry of Education.

The report notes that TEIs will need sound governance, sound financial management, and effective long-term strategic planning to meet future challenges, to safeguard public investment, and to ensure high performance. It notes that smaller councils will be more efficient and clearly focused while still enabling the workload to be spread among members. It also notes that membership should be based on expertise and skill rather than representation.

The report recommends smaller councils (seven to 12 members) and membership covering the appropriate skills. It also recommends that councils have members drawn from staff and students, but that the majority of members and the chair not be staff or students.

1997: *"A future tertiary education policy for New Zealand: Tertiary education review (Green Paper)," [Ministry of Education].*

The report notes that governance arrangements for TEIs should balance provider autonomy and self-management with stewardship of the public's ownership interest in TEIs. It also notes that current membership arrangements provide few assurances for either students or taxpayers about the mix of skills and expertise on councils. It notes that financial risks to the Crown are considerably reduced when skills and competency rather than representation predominate councils.

The report suggests that:

- council size be negotiated between each TEI and the Minister, but being within the range of six to 12 members
- the balance of skills on each council be negotiated between each TEI and the Minister
- either all members or the majority of members be ministerial appointees selected for their skills and competence
- the chair be selected from the ministerial appointees
- the chief executive not be a council member
- members could be selected for the skills and competence from stakeholder groups
- stakeholders' views could be taken into account through strengthened communication between councils and stakeholders.

1997: *J. Boston, "The Ownership, Governance, and Accountability of Tertiary Institutions in New Zealand," New Zealand Annual Review of Education 6, pp. 5-28.*

The paper notes that the Education Act 1989 confirmed the existing representative model of governance. It explains that legislative requirements regarding size mean that universities have councils bigger than boards of Crown-owned companies, but smaller than governing bodies of universities in other countries.

The paper describes benefits of certain features of the governance legislation. It explains that by including ministerial appointees, the government can ensure that all councils include people with certain expertise. It also explains that having ministerial appointees as the minority of council members reduces risks that TEIs could become subject to unwarranted government interference. It notes that the council composition is deliberately inclusive to ensure that all stakeholders have a voice on the council, and that this reflects TEIs' British origins, with emphases on institutional autonomy, academic self-governance and collegial decision-making. The paper notes that councils should represent the diversity of their community.

The author references a Treasury paper from 1996 noting concerns that TEI councils are not formally accountable to anyone. He also references a number of other sources from the 1990s expressing concerns with governance arrangements. These concerns include:

- councils are too large to operate effectively
- councils lack relevant expertise
- the inclusion of stakeholders is inconsistent with well-established principles of institutional design

- the inclusion of internal agents and interest groups generates conflicts of interest.

The paper cites sources arguing for expertise-based councils, and cites a 1994 report by the “Tertiary Capital Charge Steering Group” recommending councils of 8 to 10 members with the majority (or close to) appointed by government.

The author argues against the corporate approach that these criticisms reflect for a number of reasons, including potential for impinging on institutional autonomy and lack of evidence suggesting corporate models are suitable for universities. The paper concludes that the case for radical changes to the size and composition of TEI councils is weak.

Good governance principles⁴

Governance of private, as well as public sector organisations, addresses the structures, processes and relationships that are used in making decisions. There is general agreement among commentators on the core basic principles to achieve “good governance” for both public and private organisations. The principles generally referred to include:

- Strategic thinking – Governance bodies provide strong leadership, strategic guidance and long-term perspective to the management of the organisation.
- Responsiveness to change – Governance bodies are adept at navigating expected and unexpected change.
- Efficiency – Governance bodies operate efficiently and make the best use of available resources.
- Accountability – Governance bodies are accountable to their public and private stakeholders for their decision-making and for the management and performance of their organisation.
- Transparency – Governance bodies’ decision-making is built on a free flow of information. Processes, institutions and information are directly accessible to those concerned with them.
- Clarity of roles and responsibilities – Roles and responsibilities of the governance bodies, the management and the stakeholders of the organisation are clear.
- Participation – Governance bodies ensure that all interested parties and stakeholders have a voice and can participate in the decision-making process.

Whilst good governance can be recognised by the presence of all of these principles, in practice different types of organisations will emphasise different principles depending on their specific needs.

⁴ The following main sources have been used to compile this section:
 2003: Meredith Edwards, “Review of New Zealand tertiary education institution governance,” Ministry of Education.
 2004: *Principles of Corporate Governance*, OECD.
 2001: “European Governance: A White Paper,” Commission of the European Communities.

For example, as outlined below, each university governance model prioritises “good governance” principles differently. “Good” university governance also recognises the following two principles:

- Institutional autonomy – The freedom of an institution to act without external control, thereby protecting academic freedom.
- Academic freedom – The belief that the freedom of inquiry by students and faculty members is essential to the mission of a university.

Best practices for TEI and university governance

This section presents short summaries of guidance and recommendations issued by the OECD and the World Bank regarding best practices for TEI and university governance.

2011: “Pointers for policy development,” Tertiary Education for the Knowledge Society, OECD.

This paper includes some directives regarding governance:

- Ensure the outward focus of institutions through participation of external stakeholders in system and institutional governance and in quality assurance.
- Create a national policy framework towards institutional governance that allows institutions to effectively manage their wider responsibilities.
- Encourage development of institutional governance and management arrangements that allow for efficiency in the allocation of resources.
- Widen the participation of labour market actors in the bodies responsible for the strategic governance of tertiary institutions.

2008: Paulo Santiago et al., “Special features: governance, funding, quality,” Tertiary Education for the Knowledge Society, Vol. 1, OECD.

This paper notes that it is usually accepted that the complex mandate of governing boards requires effective bodies with an experienced and broadly based membership, and because of their external trusteeship role, a small majority of external members. It notes that it is also important that the number of members be sufficiently large to reflect a sufficiently broad number of perspectives, skills and interests but small enough to carry out its business effectively. It describes the optimal size for the governing boards as usually believed to range between 12 and 25 members.

The report notes that many TEIs remain attached to traditional cooperative/collegial governance models. It finds that this leaves a weak role for institutional leadership, where CEOs are constrained by governing bodies. It notes that countries are moving away from this cooperative-collegial model. It finds that the trend of more external council members should not necessarily exclude academics and students from governance. It notes the growing role of external stakeholders in governing bodies.

2008: John Fielden, "Global Trends in University Governance," *Education Working Paper Series, No. 9, The World Bank*.

This report finds that the size and composition of university boards in selected countries is increasingly a concern of government, and that there has been a general trend in favour of smaller boards with a majority of non-academic members. It finds that it is increasingly emphasized that board members are not to act as representative of particular interest groups, but must approach decision making with the interests of the institution as a whole in mind.

Governance of other organisations in New Zealand

A 2011 study found that the average size of New Zealand corporate boards fell from 6.6 directors to 5.9 directors between 1995 and 2010.⁵ During this time there was also a significant increase in the number of independent directors⁶ with 46% of boards having a majority of independent directors in 1995 compared with 63% in 2010. In addition, the report found that one-third of chief executives do not sit on their firms governance board.

New Zealand's state-owned enterprises (SOEs) have governance boards of between five and nine members (with an average of seven to eight). The most recent SOE to make changes to its governance structure was Solid Energy, in January 2013. As part of these changes, its board was reduced in size from seven to five members, putting it more in line with the current private sector trends.

The relationship between governance and organisational performance

This section presents short summaries of three studies that examine the relationship between governance and organisational performance. Taken together, these three studies are contradictory in their conclusions about the impact of board size on firm performance. The smaller, shorter Australian and New Zealand studies find that larger board size is correlated with better firm performance. The larger, longer UK study finds that smaller board size is correlated with better firm performance.

2009: "The impact of board size on firm performance: evidence from the UK," *The European Journal of Finance* 15(4): pp. 385-404.

This study examines the impact of board size on firm performance for a sample of 2,746 UK listed firms over 1981-2002. It finds that board size has a strong negative impact on firm performance, including on profitability and share returns. It finds that the negative relation is strongest for large firms, which tend to have larger boards. It explains that poor communication and decision-making undermine the effectiveness of larger boards. It notes that results are inconclusive with regards to optimal board size, but "reasonably conclude it is less than ten members". The report also finds that the number of outsider directors on a board has a negative impact on performance.

⁵ Glenn Boyle and Xu (Jane) Ji, "New Zealand Corporate Boards in Transition: Composition, activity and incentives between 1995 and 2010" (2011). Available online: http://www.iscr.org.nz/f697_19529/Boards01b.pdf.

⁶ An independent director is one who is not an executive of the firm and who has no disqualifying relationship. In practice, this is generally interpreted to mean that an independent director owns less than 5% of the firm's shares and receives less than 10% of his annual income from the firm.

2008: Hanolu Bathula, "Board characteristics and firm performance: evidence from New Zealand," *PhD Thesis (AUT)*.

This study examines the impact of board characteristics, including size, on firm performance for 61 New Zealand publicly listed firms from 2004-2007. It finds that board size is positively associated with firm performance, indicating the value of larger boards.

2003: Gavin J. Nicholson and Geoffrey C Kiel, "Board composition and corporate performance: how the Australian experience informs contrasting theories of corporate governance," *Corporate Governance: An International Review* 11(3): pp. 189-205.

This study examines the relationships between board demographics and corporate performance in 348 of Australia's largest publicly listed companies in 1996. It finds that, after controlling for firm size, board size is positively correlated with firm performance. But, it also finds that the skills and knowledge base of the board is more important to firm performance than its size. It concludes that the relationship between the proportion of outside directors on a board and firm performance is not conclusive.

Universities

Models of university governance

This section summarises the models of university governance described by Leon Trakman in "Modelling University Governance" (*Higher Education Quarterly* 62, nos. 1/2 (January/April 2008): 63-83).

Overview

Approaches to governance models typically address five possibilities: faculty, corporate, trustee, stakeholder, and amalgam.

Whilst it is helpful to categorise university governance models, in practice, universities generally shape governance bodies around more than one model in accordance with their specific and unique needs. For example, universities can benefit from the skills-based governance of the corporate model while maintaining stakeholder representation in recognition of distinctions between academic institutions and private corporations.

Whilst this tailoring allows flexibility in university governance, it also makes modelling difficult. In this section, the five models are described as theoretical possibilities for university governance. Because in practice governing bodies rarely follow the theoretical models directly, examples and international comparisons are given separately in the following section.

Faculty/collegial model

Faculty governance, sometimes identified with collegial models, sees universities governed by their academic staff. While councils under this model are representative of faculty, general staff and students, council members may lack specific governance skills. Under faculty governance, councils prioritise academic integrity over other governance responsibilities.

Though faculty governance is the traditional model for universities, most universities are shifting away from the model, either by training selected academic staff in governance skills or by lessening academic representation on councils.

Corporate/skills-based model

A corporate model for university governance concentrates on the governance skills of council members and is grounded in the rationale of corporate efficiency.

Under this model, universities are governed by professionals who are trained and experienced in corporate policy and planning. These skilled council members are generally elected or appointed from outside the institution, making them external council members as opposed to representative members elected or appointed internally.

International trends suggest that aspects of this model are introduced for a variety of reasons including helping universities achieve greater innovation and equipping them to better cope with economic fluctuations.

Benefits of corporate governance include internationalisation of teaching programmes and student bodies, better links with industry and commerce, more efficient internal operations, better access to research sites, more workplace-relevant teaching programs, access to better facilities and equipment, and more flexibility in recruiting high-quality staff.

Because of long-standing traditions of faculty governance, the introduction of the corporate model can result in tensions between council, management and academic staff. Those who reject this model assert that corporate-style governance produces only partial and short-term governance solutions, and leads to the “commodification” of education: corporate efficiency overwhelms academic distinctiveness, vocational training and corporate-sponsored research become favoured over societal critique, and low-cost/high-revenue strategies may lead to reductions in standards and quality.

Stakeholder/representative model

Under a stakeholder model university governance is vested in a wide array of stakeholders, including students, academic staff, alumni, corporate partners, government and the public at large.

The stakeholder model is more broadly representative than the corporate and collegial models, and its mandate prioritises representation over the central principles of corporate governance.

International comparisons show that public universities generally employ aspects of stakeholder governance by having appointed and/or elected academic staff members, students, alumni and/or government representatives on their boards.

In practice, the stakeholder model can vary depending on which stakeholders are deemed to deserve representation, the manner of their representation and the extent of their authority. For example, in jurisdictions where government funding for universities is high compared to universities’ other revenues, governments generally have more input into council membership.

The governance skills of council members under the stakeholder model depend on the balance of stakeholders represented on the board. Heavy faculty representation would mean that governance skills might be lacking, whilst heavy representation from the greater corporate community would mean that governance skills would be strong.

Trustee model

Under a trustee model universities are governed through a “trust” relationship between a trustee board that acts in trust for, and on behalf of, stakeholders.

Advocates consider that this model provides the assurance that the university governance body – i.e. the trust – will act for, and on behalf of, the university and its stakeholders, including the public and students.

The trustee model has no guarantee of strong governance skills among members or of their accountability.

Amalgam models

Amalgam models of university governance combine features of faculty, corporate, stakeholder and trustee governance. By nature, amalgam models do not require councils to prioritise academic integrity over the principles of corporate governance, or vice versa. In practice, under this model the structure of the university governance body can reflect different priorities.

The most apparent benefit of the amalgam model is that it can incorporate the strengths of different governance models to suit the specific needs of a university and its stakeholders. For example, international trends show that the majority of universities that have moved, or are moving, towards a skills-based approach to governance do so by amalgamating the corporate and stakeholder models.

Governance of overseas universities

General Trends

International comparisons show that there is a general move to a skills-based approach to governance, even though there is variance across jurisdictions and universities. For example, Austrian and Danish universities have moved towards skills-based governance approaches. Universities in the United Kingdom and Ireland have similarly shifted towards a skills-based approach, though older universities are holding to traditional faculty governance models.

Trends are less conclusive regarding council size, with council sizes varying significantly. University councils in Austria and Denmark are among the smallest, at between five and 11 members. Selected university councils in Australia, England and Ireland vary between 11 and 40 members. Selected university councils in Canada and the United States of America vary significantly, including Massachusetts Institute of Technology (MIT) with a very large council of 76 members.

Several countries have reviewed, and in some cases reformed, the governance settings for their universities, including Ireland, Scotland, Australia, Austria and Denmark.

A European study noted that reforms to university governance generally do not treat councils in isolation, but as one of three typical elements of university governance: council, academic board and chief executive(s). Overall, councils are increasingly populated by skilled leaders drawn from industry and commerce. Academic decisions remain largely in the hands of faculty, increasingly concentrated to the academic board. Management is undertaken by chief executives, with vice-chancellors (or equivalent) becoming increasingly redefined as chief executive officers (CEOs).

United Kingdom and Ireland

Universities in the United Kingdom are largely referred to as leading the shift to skills-based governance.⁷ In part, governance reforms in the United Kingdom have been necessitated by financial constraints brought about by decreased government funding and market fluctuations. See table nine for the council size of select English and Irish universities.

The Universities of Manchester and Nottingham have both been cited as having particularly effective corporate governance structures. In both cases they balance a strong governance council with strategic committees. The result is that skills-heavy councils are balanced by internally-appointed members and committees that represent the interests of the universities' various stakeholders. The University College London (UCL) offers a similar example.

The Universities of Cambridge and Oxford have been resistant to moving from a faculty/collegial model to a skills-based approach. The two institutions remain the only two British universities run by councils that consist of a majority of academics. Both institutions face pressure to move towards councils with greater external membership.

Oxford undertook an internal governance review and published the results in 2006.⁸ The paper recommends that the size of Oxford's council be reduced from 23 to 15 members, with seven internal members, seven lay members, and a lay chair. The paper recommends that a nominations committee would put forward names of lay candidates, and that all members would be approved by Congregation (alumni).

Universities in Ireland have minority external membership on councils. A review of university governance was recently undertaken⁹ in response to a Government request for advice for reforming university governance, including size and membership of councils, their functions, the role and powers of academic councils and the role of the CEO. The review notes that a 2004 OECD report was critical of the size and membership of Irish university councils and recommended they be smaller and include members with governance skills. The report recommends that the size of university councils be 10 to 20 members, with the majority of members being lay people with governance expertise.

⁷ See Trakman, cited above, and Barbara Sporn, "Convergence or Divergence in International Higher Education Policy: Lessons from Europe," *Forum for the Future of Higher Education* (2003): 31-44.

⁸ 2006: "White paper on university governance," Governance Working Party, University of Oxford.

⁹ 2012: Ruairi Quinn, "University governance: report to the Minister for Education and Skills," Irish Universities Association.

Table 9: council size of select English and Irish universities¹⁰

| University | Council size | University | Council size |
|---------------------------|--------------|--------------------------------|--------------|
| University of Cambridge | 25 | National University of Ireland | up to 38 |
| University of Oxford | 25 | University of Limerick | 34 |
| University College London | 20 | University College Dublin | 40 |
| University of Manchester | 25 | | |
| University of Nottingham | 30 | | |

A 2012 review of higher education governance in Scotland¹¹ notes that Scottish university councils tend to be quite large, from 17 to 28 members. It notes that external members often form a majority of membership and are appointed by the council or on its behalf by a nominations committee. The report recommends that:

- councils have a majority of external members and that all external members are appointed through a nominations committee
- councils should have at least two students, two staff members, academic members, and up to two alumni members
- at least 40% of council members should be female and that councils reflect the diversity of society
- councils have a skills and values matrix to evaluate members and the body as a whole against.

Australia

A 1995 review of Australian university governance recommended an amalgam corporate-stakeholder governance approach for universities. In particular, it was recommended that councils be comprised of the widest possible stakeholder views and engage external members with strong governance skills. Councils with majority external members were recommended, as were smaller councils of 10 to 15 members. It was recommended that representation through committee relationships would be employed where appropriate.¹²

A more recent study compared university council size in 1990 and 2000 (five years before and after the 1995 review).¹³ In 1990, the average size was 27 (minimum 17, maximum 44). In 2000, the average size had fallen to 22 (minimum 16, maximum 34). Nineteen universities decreased their council size, three increased their council size, and 12 councils remained the same size. The study also compared numbers of members by category, finding decreases in the number of academic staff members, parliamentarian members, and alumni. The number of Minister-appointed members

¹⁰ Counts of council membership size in tables throughout this section were taken from university websites at various points during 2012 and 2013.

¹¹ 2012: "Report of the Review of Higher Education Governance in Scotland," The Review of Higher Education Governance.

¹² David Hoare, "Higher Education Management Review" (1995).

¹³ [date unknown]: Meredith Edwards, "University governance: a mapping and some issues," LifeLong Learning Network National Conference.

was unchanged between 1990 and 2000, but their proportion was higher due to smaller council size. On average, both in 1990 and 2000, there were more external members than internal members on university councils (28 councils had more external than internal members in 2000).

Recent membership counts show that the smaller council size recommended in 1995 has been adopted by two Group of Eight (G8) universities (see table ten for the council size of select Australian universities). Three G8 universities have a majority of external members: the Universities of Melbourne, New South Wales and Sydney with 60%, 55% and 55% external membership respectively.

Table 10: council size of select Australian universities

| G8 universities | Council size | Select other universities | Council size |
|---------------------------------|---------------------|-------------------------------------|---------------------|
| Australian National University | 15 | Macquarie University | 17 |
| Monash University | 11 | Queensland University of Technology | 22 |
| University of Adelaide | 21 | University of Newcastle | 16 |
| University of Melbourne | 20 | University of Wollongong | 18 |
| University of New South Wales | 22 | | |
| University of Queensland | 22 | | |
| University of Sydney | 22 | | |
| University of Western Australia | 21 | | |

Canada

The examples of the University of Toronto (council size 50, 52% external membership), the University of British Columbia (council size 19, 47% external membership) and McGill University (council size 25; 60% external membership) show variance in council size among select Canadian universities and a focus on external members who may bring governance skills to councils.

United States¹⁴

Because of the sheer number of institutions in the United States, the variance in approaches to governance is wide. Despite this, a number of generalisations can be made about public institutions.

Public universities in the United States often belong to large university systems which often have a single governing body. The governing bodies often consist wholly or largely of state-appointed members with strong obligations to state government.

Governing structures of public universities are strongly reflective of corporate models, with efficiency and accountability prioritised and with members chosen for their skills. For example, the University of California and the University of Wisconsin are public university systems that have a single governing body. In both cases, the large

¹⁴ 2002: John V. Lombardi et al., "The center: university organisation, governance and competitiveness," *The Top American Research Universities*, The Lombardi Program on Measuring University Performance.

majority of council members are appointed by the respective state governors (the Governor of California also sits on the University of California governing council).

Also, private universities often have skills-based approaches to governance, including Stanford University and the Massachusetts Institute of Technology (MIT), though they often have large councils (33 and 76 respectively).

*Continental Europe*¹⁵

Since the early 1990s European states have increasingly deregulated and decentralised the administration of public universities by granting more institutional autonomy to the institutions, and by strengthening leadership structures with the introduction of new skills-based approaches to governance, enhanced accountability settings, and performance contracts.

Reforms were motivated by the need to respond to problems such as funding cutbacks, inefficiencies, over-regulation and inflexibility, and by successes seen in UK and US practices.

Along with recruiting council members externally in order to populate councils with skilled members, universities are increasingly offering professional development opportunities to faculty in order to develop their leadership and governance skills. This creates council members who are both highly skilled and representative.

The European experiences show that universities with council membership evenly split between external and internal stakeholders have felt significantly less controversy from academics concerned with diminished representation and have better balanced the issues of institutional autonomy and academic freedom with corporate governance principles.

Austria is seen as particularly innovative in its approaches to university reform, particularly for its small councils. Sweeping changes in 2002 prioritised institutional autonomy, performance contracts and highly skilled councils. University boards consist of five to nine members, jointly nominated by the ministry and each university's academic board. The state ministry has a supervisory role, steering universities from a distance through performance contracts and partial control over board nominations.

Denmark has addressed its university governance structures as part of larger reforms aimed to make its universities more innovative and output-oriented (see table eleven for the council size of select Danish universities). University reforms were not made in response to a perceived failure of universities. Both prior to and following the reforms, Danish universities were regarded as among the finest in Europe in both education and research. However, the political view was that the universities could be doing more to produce a highly qualified, globally competitive workforce and to improve both the relevance of their research and the diffusion of that knowledge to the private sector. Reforms to university governance involved changing faculty-dominated councils to councils populated largely by external members with strong governance skills. Council positions remain for faculty and student representation.

¹⁵ [date unknown]: Barbara Sporn, "Convergence or Divergence in International Higher Education Policy: Lessons from Europe," [source unknown].
[date unknown]: Eurydice, "Higher Education Governance in Europe: Policies, structures, funding and academic staff," European Commission.

Table 11: council size of select Danish universities

| University | Council size | University | Council size |
|--------------------------------|--------------|---------------------------------|--------------|
| University of Copenhagen | 11 | Aalborg University | 11 |
| Aarhus University | 11 | Roskilde University | 9 |
| University of Southern Denmark | 8 | Technical University of Denmark | 7 |

Wānanga

Governance of overseas indigenous tertiary education institutions

This section presents case studies of selected indigenous tertiary education institutions in three countries. Information from websites was collected in July 2013.

*First Nations University of Canada (FNUC)*¹⁶

The First Nations University of Canada (FNUC) is an educational institution created under legislation of the Federation of Saskatchewan Indian Nations. It is a financially and administratively independent college of the University of Regina. Its students are also students of the University of Regina, which confers their degrees.

In part, FNUC's accountability is tied to performance measures on funding, of which the majority comes directly from the federal Government. Good governance is one performance measure to which funding is tied.

In April 2010, the Federation of Saskatchewan Indian Nations dissolved the FNUC's governance board in response to the federal Government's announcement that it would cease funding the FNUC unless significant changes were made to improve its governance. The Government was concerned about the board being too large, about inappropriate involvement of First Nations' chiefs in FNUC's governance and management, and about FNUC's poor financial management. This led the FNUC to undertake a review of its governance structure and make significant changes.

These changes were informed by research into higher education governance models from around the world, particularly existing indigenous higher education governance models and general governance best practice. They were also informed by stakeholder consultation with First Nations Elders and Veterans, FNUC students and staff, chiefs from the Federation of Saskatchewan Indian Nations, and representatives from the University of Regina.

FNUC's review of its governance resulted in a reduction in the size of the board from 19 members to nine members (eight voting members and one non-voting chairperson). This decision was informed by concerns from stakeholders about the unwieldy size of the board and studies into the governance of US indigenous colleges, which found that their boards were efficient and numbered between five and 12 members. The decision was made not to go lower than nine members, because best practice research showed that anything less than eight to ten members

¹⁶ Information in this section is taken from the FNUC's website (<http://www.fnuniv.ca/history-2/bog>) and "First Nations University of Canada Governance Plan: An opportunity to lead the world in First Nations higher education," 2010, prepared by M.A. Begay II & Associates, LLC, commissioned by First Nations University of Canada Ad-Hoc Committee: Governance of the First Nations University of Canada Board of Governors.

would be too small to encompass the different types of expertise and experience needed.

Two elders, one male and one female, serve the board as non-voting advisors appointed by the Elders Advisory Council. One student and one faculty member serve as non-voting observers to the board.

Changes also resulted in a more skills-based governance model, with emphasis placed on both governance and cultural expertise.

The review of governance also addressed conflicts of interests resulting from staff and students being voting members of the board. It was decided that students and staff may have allegiances that could hamper them from making independent and objective decisions on behalf of the university. Their roles on the board changed to that of non-voting observers.

*Batchelor Institute of Indigenous Tertiary Education (Australia)*¹⁷

The Batchelor Institute of Indigenous Tertiary Education was established by the Batchelor Institute of Indigenous Tertiary Education Act 1999 as an educational institution for the tertiary education of indigenous people of Australia and the provision of other educational and training programs and courses, and facilities and resources for research and study, and for related purposes.

A central task of the Institute is the provision of tertiary education and training programs which engage students in the development of appropriate responses to issues of cultural survival, maintenance, renewal and transformation, within the context of the national and international social, political and economic order.

The Institute has a council of 10 members. Prior to the passing in 2012 of amendments to the Batchelor Institute of Indigenous Tertiary Education Act 2005, the council was 22 members in size. The amendments established an advisory board of six indigenous members to inform and advise the council. The new council was said to be more representative, with new members bringing a range of expertise, such as financial, remote, and vocational experience. The amendments also defined the functions and responsibilities of the council.

Council membership details since 2012 are as follows:

- 1 nominated by the Minister who will be the chairperson
 - The chairperson should be, where practical, indigenous and experienced. The chairperson cannot be a staff member or student.
- 4 nominated by the Minister
 - one must be an indigenous person who has experience in advising government or other service providers about indigenous matters
 - one must have specialist professional or vocational knowledge about, or expertise in, delivering education and training, preferably to indigenous people in remote areas of Australia
 - one must have demonstrated commercial and financial expertise and experience

¹⁷ Information in this section is taken from the Batchelor Institute of Indigenous Tertiary Education's website (<https://rest.batchelor.edu.au>) and from the Batchelor Institute of Indigenous Tertiary Education Act (available here http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/nt/consol_act/bioitea541/s11.html?stem=0&synonyms=0&query=council and here <http://notes.nt.gov.au/dcm/legislat/history.nsf/d2340eb59903a401692569f900180b08/f9f2313a16c21921692572a30002156d?OpenDocument>).

- one must have experience, knowledge or expertise, not necessarily of a kind mentioned above, that is appropriate for the effective exercise of powers and performance of functions as a member
- at least one must usually reside in the northern region of the Territory
- at least one must usually reside in the southern region of the Territory
- 1 nominated by the council of Charles Darwin University
- 1 elected from and by staff
- 1 elected from and by students
- The Director
- The CEO of the Education Agency responsible for administration of the Education Act.

Council membership details from 2005 to 2012 were:

- The chairperson of the council
- The CEO of the Education Agency responsible for administration of the Education Act
- 1 elected from and by the students
- 1 elected from and by staff who are Aborigines and Torres Strait Islanders
- 1 elected from and by academic staff
- 3 nominated by the Minister: one for knowledge or skills in higher education, one for knowledge or skills in vocational education and training, one for commercial and financial expertise
- 1 appointed by the council who has knowledge or skills in the provision of health services to Aborigines and Torres Strait Islanders
- 1 appointed by the Ministerial Advisory Board for Employment and Training for knowledge or skills in vocational education and training for Aborigines and Torres Strait Islanders
- 5 who reside in the Central Zone and are nominated in accordance with the by-laws for the zone
- 6 who reside in the Northern Zone and are nominated in accordance with the by-laws for the zone
- 1 nominated by the council for financial expertise.

Selected institutions in the United States of America (USA)

The federal Bureau of Indian Education (BIE), part of the Bureau of Indian Affairs, provides financial support to approximately 35 tribally operated colleges and universities across the USA and directly operates two institutions: Haskell Indian Nations University and Southwestern Indian Polytechnic Institute.¹⁸ It seems that, with regards to governance, tribally operated colleges are governed by the tribe(s) involved. The following selected examples provide basic information about institutions' boards:

¹⁸ <http://www.bie.edu>

- Bay Mills Community College
 - Board of Regents: ten members. Seven are members of the Bay Mills Indian Community; two are members of other bands/tribes; one is the student body president.¹⁹
- College of Menominee Nation
 - Board of Directors: eight members (including one honorary member), all of whom are enrolled members of the Menominee Indian Tribe of Wisconsin.²⁰
- Haskell Indian Nations University
 - A pan-tribal university for members of federally recognised Native American tribes in the USA. Board of Regents: 15 members, including one from the student senate and one from the alumni association; remaining members represent different tribal areas or US regions.²¹
- Sinta Gleska University
 - Board of Regents: three members, including the chair.²²
- Southwestern Indian Polytechnic Institute (SIPI)
 - SIPI is governed by an eleven member Board of Regents which represents and are appointed by the following tribal entities: Jicarilla Apache Tribe, Mescalero Apache Tribe, Navajo Tribe (Eastern and Western), Northern Pueblos Council, Ten Southern Pueblos, Southern Ute Tribe, Inter-Tribal Council of Arizona, Joint Oklahoma Tribes, and the SIPI Student Senate.²³

Effective governance of Māori organisations

This section summarises information gathered in July 2013 from Te Puni Kōkiri's (TPK) website²⁴, which has detailed advice on effective governance of Māori organisations, focusing on those that safeguard and grow assets. This summary focuses on those aspects of TPK's advice that focus on Māori-specific governance issues (rather than general governance issues that would apply to any organisation).

¹⁹ http://www.bmcc.edu/about_bmcc/regents.html

²⁰ http://www.menominee.edu/uploadedFiles/CMN/Development/CMN_Annual_Report_Web_Oct_2012.pdf

²¹ <http://www.haskell.edu/downloads/Annual%20Reports/HINU%202012%20Annual%20Report.pdf>

²² <http://www.sintegleska.edu/administration.html>

²³ <http://www.sipi.edu/about/bor/>

²⁴ <http://www.tpk.govt.nz/en/services/effective/>

What is governance?

In Māori organisations, the objectives of governance will take into account the way in which Māori relate to the assets and what they are used for. In some instances, although the organisation operates commercially, commercial objectives may be balanced with the need to safeguard the assets for future generations.

Tikanga principles may also be put into practice in the board of a Māori organisation alongside governance principles. Tikanga, kawa and values that meet the aspirations of iwi, hapu and whanau often give direction to board work. Tikanga can easily fit alongside governance best practice.

Many Māori organisations have an extremely long-term view of their future. This has implications for many aspects of governance such as selecting board members with a view to handing the business on, and in strategic planning where a 25-year view, or even more, may be taken. Some stakeholders, including people providing finance, may take a short-term view, for example focusing on immediate and short-term returns or only thinking in terms of a five-year planning cycle. Good communication with stakeholders and potential financiers about the strategic plan is therefore recommended to ensure that any long-term view is well understood.

Board appointments

Rather than a strictly business skill base, board appointments in Māori organisations may be influenced by the requirements of the specific structure of the organisation (say a trust under the Te Ture Whenua Act), by an election process (for example a Māori Trust Board) by whakapapa and tikanga requirements (a rangatira or respected elder), whanaungatanga (a relative), or because of expertise in other fields (i.e. business/financial skills/qualifications).

If a board for example cannot find all the skills in one person, the board may balance people who are appointed for business skills and others for their tikanga skills. There is a perception that the pool of "experts" is small, especially for those who have expertise in business and finance. Transparent appointment processes are recommended and help to avoid allegations of appointing relatives to key positions. Quality control issues are also important and can be helped by advertising vacancies, candidate vetting, education/training of existing board members, regular board member rotation, annual assessment/audit of performance and procedures for removal of board members in the event of non-performance.

A board's success depends entirely on the people who sit around the board table and how they contribute their skills and perspectives to discussion and debate. In some structures, the directors/trustees are elected by the owners/shareholders so the board composition is decided by the election process. In others, directors/trustees are appointed and the mix of skills can be carefully planned. In all boards the mix of directors/trustees should be one that gives the depth and breadth needed to make good decisions for the future of the organisation.

The size of the board depends on the mix of skills needed, legal, constitutional and representation requirements, the size of the organisation itself, and the number of people that can be expected to work effectively together.

Appendix Four: Matters related to university and wānanga governance, including constitutions, diversity, terms of office and other matters

This appendix includes details of matters related to university and wānanga governance. Table twelve summarises these matters and options and recommendations for each. Subsequent sections provide details on each matter.

Table 12: Summary of matters related to university and wānanga governance with options and recommendations for change

| Issue | Status quo for universities and wānanga | Recommended options | Alternative options (not recommended) |
|---|--|---|---|
| Approval of university and wānanga constitutions | Constitutions determine council size and membership; the Minister examines constitutions for compliance with legislation and publishes in the <i>Gazette</i> . | Retain the current provisions. | Grant the Minister the power to reject a recommended constitution. Dispense with constitutions and use statutes to determine size and membership. |
| Ethnic and socio-economic diversity of councils | It is desirable that councils reflect the ethnic and socio-economic diversity of the communities served by the institution, and that the Minister should consider this in making council appointments. | Retain the current provisions and extend them such that councils also consider ethnic and socio-economic diversity in making council appointments. | --- |
| Representation of Māori on councils | Māori are not required to be represented on councils or to be considered in making council appointments. | Councils should include Māori, and the Minister and councils should consider this when making council appointments. | --- |
| Representation of women on councils | It is desirable that councils reflect the fact that half the population of New Zealand is male and half the population is female, and that the Minister should consider this in making council appointments. | Revise legislation to be more strongly worded to increase the number of women on TEI, especially university, councils and support the Government's commitment to increase the participation of women in governance in the public sector to 45%. | Remove the current provisions. Retain the current provisions and extend them such that councils also consider them in making council appointments. |
| Number of occasions a member can be appointed | Constitutions must include provisions limiting the number of occasions on which a person may serve as a member of the council. | Revise provisions such that universities and wānanga can choose to set limits through their constitutions, but are not required to do so. | Eliminate provisions such that there are no limits. |
| Term of office | The standard term of office is four years, excluding student members, who hold office for one year, and co-opted members, who hold office for a period not to exceed four years. | Revise the term of office such that all council members would serve a term of no more than four years. | --- |
| Casual vacancies | If a council member leaves office before the end of their term, their successor is only appointed to the end of their predecessor's term. | Remove provisions placing restrictions on filling casual vacancies for all TEIs. | --- |

| Issue | Status quo for universities and wānanga | Recommended options | Alternative options (not recommended) |
|---|--|--|--|
| Ineligibility for council membership | | Any person who has been removed from a council be ineligible for future appointment. | --- |
| Membership of more than one council | There are no provisions either explicitly allowing or preventing membership of more than one council. (Provisions explicitly allow membership of more than one council for ITPs.) | Allow a person to be a member of more than one university or wānanga council and/or a member of more than one council of TEIs of different types. | --- |
| Voluntary combination of councils and combination of academic boards | Not permitted (Permitted for ITPs) | Enable two or more universities or wānanga, and two or more TEIs of different types, to voluntarily combine councils and/or combine academic boards. | Enable the Minister to require designated TEIs to consider the benefits of combining councils and/or academic boards and report to the Minister. |
| Frequency of election of chairperson and deputy chairperson | Elected by the council for terms of one year. | No longer than the term for which the chairperson or deputy chairperson is appointed to the council, at the discretion of the council. | --- |
| Colleges of education and specialist colleges | Colleges of education and specialist colleges have the same governance settings as universities and wānanga. | Governance changes to universities and wānanga would also apply to colleges of education and specialist colleges. | --- |
| Council members' interests | Most universities and all ITPs (but not wānanga) may be bound by the Local Authorities (Members' Interests) Act 1968, which restricts eligibility for membership on a council by disqualifying anyone with an interest in the institution of over \$25,000. TEIs are also bound by members' interests provisions in the Education Act 1989, which are less restrictive. | Expressly exclude universities and polytechnics from the ambit of the Local Authorities (Members' Interests) Act 1968. | --- |

Approval of university and wānanga constitutions

Each university and wānanga currently establishes the size and membership of its council (along with a few other more minor matters) through a constitution. The constitution must be written in accordance with legislation. The Minister confirms that a proposed constitution meets legislative requirements and publishes a notice in the *Gazette* to determine the constitution. Once gazetted, each institution must abide by its constitution. An institution's council can recommend changes to its constitution, upon which the Minister publishes a new notice in the *Gazette*.

As long as a recommended constitution complies with legislation, the Minister has no powers to reject it. Given the prescriptive nature of the current legislation, ministerial approval power would not add value to the process.

Constitutions are necessary, because legislation for universities and wānanga allows some flexibility regarding size and membership of councils. Since the 2009 reforms

to governance of ITPs, they no longer determine their own constitutions, because council size and membership is determined by legislation.

Universities, ITPs and wānanga all have statutes. Statutes, separate from constitutions, determine, in part, how some council members are elected, appointed or co-opted. The contents of statutes are, in part, governed by legislation, but they are not documents that are subject to the Minister's approval or published in the *Gazette*.

If reforms to university and wānanga governance are made, there will still be flexibility regarding council size (eight to twelve members; four appointed by the Minister) and membership (no representative requirements; consideration given to skills and experience). Universities and wānanga will need to use constitutions to determine these characteristics of their councils.

Options and analysis

Table thirteen analyses options regarding university and wānanga constitutions.

Table 13: analysis of options for changes to university and wānanga constitutions

| Option | Benefits | Drawbacks |
|--|---|---|
| 1. Status quo (recommended) | Universities and wānanga maintain their autonomy under legislation to make certain decisions about the size and membership of their councils. | A university or wānanga could, theoretically, recommend a council that may not have been intended under new legislation allow – e.g. four ministerial appointees and eight student or staff representatives. Such a council, though it may be legal, may not be best placed to govern the institution. |
| 2. Grant the Minister the power to reject a recommended constitution* | The Minister could ensure that legislation is applied in the manner in which it is intended and that will serve each institution well. | Universities and wānanga may see any additional ministerial powers as impinging on their autonomy and as a signal of desire for more ministerial control over governance matters. This would contradict the messaging around proposed changes to size and membership as giving universities and wānanga more flexibility in determining their councils. There is potential for uncertainty regarding what the Minister might or might not approve. Uncertainty could also occur if future Ministers apply the approval powers in different ways. There could be ways to mitigate this, by issuing guidelines of what would or would not be approved, but these would not be binding. |
| 3. Dispense with constitutions and use statutes to determine size and membership** | The process for establishing council size and membership would be simplified by not involving a separate constitution document and the process of publishing a notice in the <i>Gazette</i> . | A university or wānanga could, theoretically, establish a council that may not have been intended that the new legislation allow. There would no longer be a formal mechanism for ensuring councils comply with legislation. This would have to be done through regular, manual examinations of statutes. |

* Rejecting a constitution could trigger a negotiation period, during which time the Minister and the council work in good faith to establish a mutually agreed constitution.

** This would mean that the Minister would not be involved in gazetting or approving the size or membership of the council.

The likelihood of a university or wānanga proposing a council that does not reflect the intention of the new legislation is small. Universities and wānanga will seek high-performing councils and will establish constitutions that will enable them to achieve this. Universities and wānanga may retain some members of councils who are representatives of particular stakeholders – e.g. the recent proposal from the University of Canterbury – but members would have to meet new skills requirements. Further, the drawbacks of granting the Minister approval powers are likely to be significant in terms of reaction from the sector.

Given the nature of constitutional documents, changes to the status quo would be perceived by the sector as significant matters that should be the subject of consultation.

On balance, the status quo is recommended.

Ethnic and socio-economic diversity of councils

Current legislation for university and wānanga governance states that it is desirable that university and wānanga councils reflect the ethnic and socio-economic diversity of the communities served by the institution, and that the Minister should consider this in making appointments to councils.

These provisions were retained for ITPs in the 2009 reforms.

It is important that universities and wānanga have strong connections to the communities that they serve. Their graduates need to be able to contribute to the local economy; their research needs to address local issues; their services need to be connected to other organisations in the community. It is important for university and wānanga councils to facilitate these connections at a strategic level.

It is recommended that the current provisions be retained and extended such that councils also consider them in making appointments. This recognises that councils will have significant flexibility over the members they appoint to councils and would be well placed to address gaps on councils.

Representation of Māori on councils

The current legislation does not require that Māori be represented on university or wānanga councils or express it as a consideration in making appointments to councils.

The current legislation for ITPs states that it is desirable in principle that the council should include Māori, and that the Minister should consider this in making appointments to councils. This was included in the 2009 governance reforms to recognise the fact that the Minister is well placed to address gaps on councils through the exercise of his or her power to appoint members.

In 2012, Māori made up approximately 15% of the general population, 10% of all students enrolled in universities, and 56% of students enrolled in wānanga.

Broken down by subsector, the percentage of Māori on councils varies significantly. Māori make up a significant proportion of wānanga councils at approximately 86%. The rates are, however, much lower for universities, where the proportion of Māori on

councils is approximately 4%. Table fourteen shows the number and percentages of Māori on university, wānanga and all TEI councils.

Table 14: Māori on university, wānanga and all TEI councils

| | | Total Māori council members | Māori Ministerial appointees | Other Māori council members |
|----------------------------|----------------------------------|------------------------------------|-------------------------------------|------------------------------------|
| University councils | Māori members | 6 | 2 | 4 |
| | Total members | 136 | 32 | 104 |
| | % of total members who are Māori | 4% | 6% | 4% |
| Wānanga councils | Māori members | 43 | 12 | 31 |
| | Total members | 50 | 12 | 38 |
| | % of total members who are Māori | 86% | 100% | 82% |
| All TEI councils | Māori members | 73 | 26 | 47 |
| | Total members | 319 | 111 | 208 |
| | % of total members who are Māori | 23% | 23% | 23% |

Note: This information is based on self-declared ethnicity information. This information reflects people on councils as at 4 December 2013; it does not include vacancies but it does include the appointments that the Minister for Tertiary Education, Skills and Employment took to Cabinet committee for confirmation on 3 December 2013.

Ka Hikitia – Accelerating Success 2013-2017 outlines the Government’s strategy of changing how the education system performs so that all Māori students gain the skills, qualifications and knowledge they need to enjoy and achieve education success as Māori. It also sets out the Government’s goal for Māori students to achieve qualifications at a rate on par with other students.

As actions are put in place to meet this goal and as Māori populations increase, Māori will participate in tertiary education at higher and higher rates. Universities and wānanga need to have councils that have capability to set long-term strategic direction for the institutions to ensure the success of their Māori students. Māori participation on councils will help to ensure that universities and wānanga are equipped to support their Māori students.

The proportion of Māori on university councils is low and should be increased. The current general provision stating the desirability that councils reflect the ethnic and socio-economic diversity of the communities served by the institution is not resulting in sufficient numbers of Māori on university councils.

It is recommended that the reforms to university and wānanga governance state that it is desirable in principle that university and wānanga councils should include Māori, and that the Minister should consider this when making appointments to a university or wānanga council. This is consistent with the 2009 changes in the ITP sector, and recognises the fact that the Minister is well placed to address gaps on councils through the exercise of his or her power to appoint members.

It is recommended that councils should also consider Māori when making appointments to their councils. This recognises that councils will have significant flexibility over the members they appoint to councils and would be well placed to address gaps on councils.

Representation of women on councils

Current legislation includes provisions stating it is desirable that university and wānanga councils reflect the fact that half the population of New Zealand is male and half the population is female, and stating that the Minister should consider this in making appointments to councils. This reflects the Crown Entities Act 2004, which directs Ministers to take into account the desirability of promoting diversity in making appointments to Crown entity boards.

These provisions were removed for ITPs in the 2009 reforms.

Currently, the percentage of women on all TEI councils is approximately 34%. This is below the proportion of women in the general population, at approximately 51% in 2012, and below the proportion of female students in universities (58%) and wānanga (70%) in 2012.

Broken down by sector, the percentage of women on councils varies significantly. Women make up a higher proportion of wānanga council at approximately 38%. The rates are lower for universities, where the proportion of women on councils is approximately 28%. Table fifteen shows the number and percentages of women on university, wānanga and all TEI councils.

Table 15: Women on university, wānanga and all TEI councils

| | | Total female council members | Female Ministerial appointees | Other female council members |
|----------------------------|-----------------------------------|-------------------------------------|--------------------------------------|-------------------------------------|
| University councils | Female members | 38 | 6 | 32 |
| | Total members | 136 | 32 | 104 |
| | % of total members who are female | 28% | 19% | 31% |
| Wānanga councils | Female members | 19 | 5 | 14 |
| | Total members | 50 | 12 | 38 |
| | % of total members who are female | 38% | 42% | 37% |
| All TEI councils | Female members | 107 | 32 | 75 |
| | Total members | 319 | 111 | 208 |
| | % of total members who are female | 34% | 29% | 36% |

Note: This information reflects people on councils as at 4 December 2013; it does not include vacancies but it does include the appointments that the Minister for Tertiary Education, Skills and Employment took to Cabinet committee for confirmation on 3 December 2013.

The Government is focused on increasing the number of women in governance roles in the public sector and has a target of 45% participation of women on state sector boards and committees by the end of 2014.

The percentage of women on university and wānanga councils is lower than the average rate of Ministerial appointments to state sector boards and committees. In 2012, the percentage of Ministerial appointments to state sector boards and committees that were women was approximately 41%, according to the Ministry of Women's Affairs.

The proportion of women on university and wānanga councils is low and should be increased.

Options and analysis

Table sixteen analyses options to increase the proportion of women on university and wānanga councils.

Table 16: Analysing options for increasing the proportion of women on university and wānanga councils

| Option | Analysis |
|---|--|
| 1. Remove the current provisions | Removing the current provisions is unlikely to result in an increase in the proportion of women on university and wānanga councils, and may result in a further decrease. |
| 2. Status quo | The wording of the legislation is vague and not binding. The decline in the proportion of women on councils since December 2011 suggests that the current provisions will not result in an increase in the proportion of women on university and wānanga councils. |
| 3. Retain the current provisions and extend them such that councils (as well as the Minister) consider them in making council appointments | This may help to increase the proportion of women on university and wānanga councils, but because the wording of legislation would still be vague and not binding, an increase cannot be assured. |
| 4. Revise legislation to be more strongly worded than the current provisions to better support the increase of women on TEI, especially university, councils (<i>recommended</i>) | This could result in clearer legislation that is binding and that would be more likely to increase the proportion of women on university and wānanga councils. |

It is recommended that reforms to university and wānanga governance include legislation more strongly worded than the current provisions to better support the increase of women on TEI, especially university, councils.

Number of occasions a member can be appointed

Current legislation for university and wānanga governance requires that each university and wānanga include a provision in its constitution limiting the number of occasions on which a person may serve as a member of the council.

These provisions were simplified for ITPs in the 2009 reforms such that there are no limits (either in legislation or in any document produced by the ITP) on the number of occasions on which a person may serve as a member of the council. Any member of an ITP council can be reappointed for a second or later term.

According to the Tertiary Education Commission (TEC), good governance practice is for members to serve no more than two four-year terms except under extenuating circumstances. This practice is followed for Ministerial appointees: for example, of the 51 appointments the Minister for Tertiary Education, Skills and Employment made to TEI councils in 2013, only two were appointments beyond a second term and these were for extenuating circumstances.

In practice, the limits placed by universities and wānanga on the number of occasions a person may serve as a member of a council vary widely and can be easily changed by amending their constitutions, such that for some institutions they do not serve a practical purpose. Some universities and wānanga value experience and set the number of reappointments allowed for their councils quite high so as to retain experienced members. Institutions can continue to adjust the number of terms to accommodate experienced members that they wish to retain.

Other institutions may see benefit in limiting reappointments to help facilitate new people bringing new ideas to their councils.

Options and recommendation

There are three options available:

- Retain the status quo.
- Remove limits on the number of occasions on which a person may serve as a member of a university and wānanga council.
- Revise provisions limiting the number of occasions on which a person may serve as a member of a council such that universities and wānanga can choose to set limits through their constitutions, but are not required to do so (*recommended*).

There are benefits to giving universities and wānanga flexibility to either set limits on council reappointments, if they value the ability to refresh membership on a regular basis, or not set limits on council reappointments, if they value the ability to retain skilled and experienced council members. Alongside flexible legislation, the TEC could issue guidance to encourage universities and wānanga to follow good governance practice with regards to reappointments.

It is recommended that the reforms to university and wānanga governance revise provisions regarding the number of occasions on which a person may serve as a member of a council such that universities and wānanga can choose to set limits through their constitutions, but are not required to do so.

Term of office

The standard term of office for university and wānanga council members is currently four years. This excludes students, who hold office for one year, and co-opted members, who hold office for a period not to exceed four years.

When the reforms for ITPs were made, this was revised such that members serve a term of no more than four years.

This allows for staggering appointments such that councils are continually refreshed rather than losing a significant proportion of their membership at the same time. This also simplifies the legislation.

The shorter term of office for students is likely intended to allow frequent turnover in student representatives, such that interested students have opportunities to hold council membership during their period of study. However, the short term of office means that students have limited time to build their confidence, knowledge and skills as council members.

Under proposed changes to university and wānanga councils, all council members will be considered for their relevant skills, knowledge or governance experience, rather than their institutional affiliation (student, staff, etc.). This eliminates any need to set separate terms of office based on any institutional affiliation a member may have. For students, this may limit the number of students who are able to gain from the experience of being a council member. However, any student council members will be selected for their relevant skills, knowledge or governance experience, rather than because they are a student.

It is recommended that the reforms to university and wānanga governance revise the term of office such that all council members would serve a term of no more than four years.

Casual vacancies

Current provisions for university and wānanga councils regarding casual vacancies state that if a council member leaves office before the end of their term, their successor is only appointed to the end of their predecessor's term. This provision also applies to ITPs.

This type of provision does not apply to institutions covered by the Crown Entities Act 2004.

The current provisions for TEIs mean some members are appointed for very short terms to serve out the term of their predecessor, even if it is intended that they will continue to serve on the council. They then have to be reappointed to be able to continue to serve on the council. This can create uncertainty for a council member who may wish to serve a full term, but can only be initially appointed for a short time. It can also create unnecessary administrative work for councils, the Tertiary Education Commission, and the Minister.

The current provisions may reflect some private-sector practices: where membership of company boards is refreshed all at once, vacancies can only be filled until the time that all membership is refreshed.

TEIs do not follow this practice of refreshing their councils all at once. Instead, appointment dates are staggered and terms of office are varied to help ensure continuity on councils. This continuity helps to ensure institutional knowledge and experience is maintained within councils. Therefore, there are no obvious benefits to the current provisions.

In fact, the current provisions can restrict the Minister and councils to unnecessarily appointing members for short terms to fill casual vacancies. If the recommendation that all council members serve a term of office of no more than four years is adopted,

this gives flexibility to appoint members for a shorter term if it is preferred. The provisions regarding casual vacancies would be redundant.

It is recommended that the reforms to university and wānanga governance remove provisions placing restrictions on filling casual vacancies for all TEIs (ITPs included).

Ineligibility for council membership

It is recommended that, if legislation is changed to include an accountability mechanism to remove an individual council member for poor performance, additional legislation be included such that any person who has been removed from a university or wānanga council be ineligible for future appointment. This would be consistent with the settings currently applied to ITPs. This would help to ensure that councils are populated by high-performing members.

Membership of more than one council

There is nothing in the current legislation for universities and wānanga that addresses the issue of a person being a member of more than one council – it is neither explicitly allowed nor prevented.

In practice, some people are members of more than one council.

When the reforms to ITP governance were made, provisions were added to the Act to explicitly allow membership of more than one ITP council.

Allowing membership of more than one council offers opportunities for strategic collaboration and cooperation between TEIs with close relationships. Strategic collaboration and cooperation occurs between TEIs of different types – e.g. a university and an ITP, a university and a wānanga, etc. – not just between TEIs of the same type.

Allowing membership of more than one council would also allow the Minister and councils more flexibility to appoint the most capable council members.

It would be useful for legislation to explicitly allow membership of more than one council.

It is recommended that the reforms to university and wānanga governance include a new provision allowing a person to be a member of two or more university or wānanga councils.

Further, it is recommended that the reforms to university and wānanga governance include a new provision allowing a person to be a member of two or more councils of TEIs of different types – e.g. one university council and one wānanga council, one ITP and one university council, etc.

Voluntary combined councils and combined academic boards

The Act does not currently allow for universities or wānanga to have combined councils or combined academic boards.

The 2009 reforms allow ITPs to voluntarily combine councils and combine academic boards. Such arrangements are intended to encourage greater collaboration between

ITPs, to allow opportunities for weaker ITPs to benefit from stronger ones, and to allow opportunities for ITPs to boost efficiency by combining governance and administrative capabilities. Since the reforms, one combined council has been established (1 January 2012) to govern Whitireia Community Polytechnic and Wellington Institute of Technology, as part of their efforts to provide a common strategy for the provision of vocational tertiary education in Wellington.

While at present the need for these arrangements for universities and wānanga may not be as explicit as it was in the ITP sector, this legislative change is part of a comprehensive approach to reforming university and wānanga governance. The opportunity for universities and wānanga to combine councils and/or academic boards may be useful in the future. It could allow TEIs that serve a similar community to combine their councils and/or academic boards as a means of ensuring that a network of TEIs are collectively able to meet that community's needs (for example, the type of provision offered, and pathways to further study).

As with the current settings for ITPs, a combined council would be at the Minister's discretion, based on the recommendation of the councils concerned. The Minister would not be able to direct any TEIs to combine councils without their agreement. A combined academic board would be entirely a matter for the councils to decide.

A further option could involve stronger legislation that enabled the Minister to require designated TEIs to consider the benefits of combining councils and/or academic boards and report to the Minister. This could enable the Minister to be more actively involved in encouraging collaboration between TEIs. However, it risks being perceived as impinging on institutional autonomy and also risks signalling that the Government has an agenda to merge TEIs, including universities and wānanga.

It is recommended that reforms to university and wānanga governance include a new provision enabling two or more universities or wānanga to voluntarily combine councils and for two or more university or wānanga councils to combine academic boards.

It is recommended that reforms to university and wānanga governance include a new provision to enable two or more TEIs of different types – e.g. one university and one wānanga, or one ITP and one wānanga, etc. – to voluntarily combine councils and for two or more councils of TEIs of different types to combine academic boards.

Frequency of election of chairperson and deputy chairperson

University and wānanga chairpersons and deputy chairpersons are elected by the council for terms of one year. ITP chairpersons and deputy chairpersons are appointed by the Minister for terms that equal their terms as council members (which can be no more than four years).

During consultation with universities and wānanga on the proposed changes to university and wānanga governance, several people explained that the one-year terms for chairpersons and deputy chairpersons are too short. Some people explained that elections are sometimes unnecessary formalities, when it is clear that a particular person will hold the chairperson or deputy chairperson office for more than one year.

It is recommended that the term of office for university and wānanga chairpersons and deputy chairpersons be revised to be no longer than the term for which the

chairperson or deputy chairperson is appointed to the council, at the discretion of the council. This means that a council member could hold the position of chairperson or deputy chairperson for as long as their appointment to the council, or for a shorter period, as the council prefers in each individual case.

This gives flexibility councils to continue to elect chairpersons and deputy chairpersons for short periods, such as the current one year, or for longer periods, up to the maximum length of a council member's term, which is recommended above to be no more than four years.

Colleges of education and specialist colleges

In addition to universities, ITPs and wānanga, the current governance settings under sections 169 to 171 and 173 to 179 of the Act also apply to colleges of education and specialist colleges. There are currently no TEIs of these types in operation. However, just as the current governance arrangements are not ideal for universities and wānanga, they would similarly not be ideal for colleges of education or specialist colleges.

Changes to the governance of universities and wānanga are likely to be sufficiently flexible to allow colleges of education and specialist colleges to adapt them to their unique characteristics and to benefit from the modernised governance arrangements. Changes to universities and wānanga governance settings should also apply to colleges of education and specialist colleges.

Council members' interests

All ITPs and most universities (except Auckland University of Technology) may be bound by the Local Authorities (Members' Interests) Act 1968 (Members' Interests Act).²⁵ The Members' Interests Act restricts eligibility for council membership by disqualifying anyone with an interest in the university or ITP of over \$25,000.

This restricts the pool of potential candidates for university and ITP council membership and may exclude highly skilled and experienced people who could be valuable council members. This would not reflect one of the objectives of the proposed changes to university councils: to focus council membership selection on candidates' capabilities.

This would particularly affect universities (except Auckland University of Technology) and ITPs, given that the provisions in the Members' Interests Act are not uniformly applied to all TEIs.

The Members' Interests Act is not in keeping with the treatment of members' interests for other Crown Entities in the Crown Entities Act 2004. The Crown Entities

²⁵ Auckland University of Technology and wānanga are not included in the ambit of the Members' Interests Act, because they were established after the Members' Interests Act and because, upon establishment, they did not fall within any of the classes of local authorities or public bodies to which the provisions apply (see the Members' Interests Act, Schedule 1, Part 1). ITPs fall under the Members' Interests Act as a class of local authorities or public bodies (see reference to "governing bodies of technical institutes" in the Members' Interests Act, Schedule 1, Part 1); universities (other than Auckland University of Technology) fall under the Members' Interests Act as individually named institutions (see the Members' Interests Act, Schedule 1, Part 2).

Act 2004 does not restrict membership eligibility based on interests. Instead, it indicates that interests must be disclosed, and that members with interests in matters may not vote on those matters. It also lays out sanctions for failing to disclose interests.

The provisions in the Members' Interests Act are in addition to sections in the Education Act 1989 that also address TEI council members' interests:

- Section 175 of the Education Act 1989 lays out requirements for TEI council members to disclose interests and to abstain from discussions and decisions with regards to any interests.
- Section 174(3)(d) of the Education Act 1989 includes provisions allowing councils to dismiss a member who fails to comply with the provisions in section 175.

The Auckland University of Technology and wānanga are only governed by the provisions in the Education Act 1989 regarding council members' interests.

Whether the Members' Interests Act still applies to most universities and ITPs is unclear, given the more recent provisions in the Education Act 1989. It could be interpreted that the two Acts are both in force, or that the Education Act 1989 supersedes the Members' Interests Act and that it no longer applies.

Maintaining the status quo means that the lack of clarity regarding whether the Members' Interests Act is still in force will continue. It also means that the application of members' interests legislation could continue to be different for different TEIs. The pool of capable council members could be limited for universities (except Auckland University of Technology) and ITPs.

It is recommended that universities and ITPs be expressly excluded from the ambit of the Members' Interests Act. Instead, the Education Act 1989 should be solely relied on to address the issue of members' interests.

This would clarify that the Members' Interests Act no longer applies to TEIs. This would mean that no person could be excluded from university or ITP council membership because of any interest they may have in an institution. Provisions in sections 174 and 175 of the Education Act 1989 would cover disclosure of interests, abstention from discussions regarding interests, and sanctions for not addressing interests as required.